

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915

No. [REDACTED] 329

R. B. STOWE, TRUSTEE IN BANKRUPTCY OF THE ESTATE
OF J. DOWNEY HARVEY, A BANKRUPT, APPELLANT,

vs.
S. G. HARVEY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

FILED JANUARY 12, 1916.

(24,522)

(24,522)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 778.

B. S. STOWE, TRUSTEE IN BANKRUPTCY OF THE ESTATE
OF J. DOWNEY HARVEY, A BANKRUPT, APPELLANT.

vs.

S. G. HARVEY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

INDEX.

Caption	Page
Transcript of record from the district court of the United States for the northern district of California.....	a 1
Amended præcipe for record.....	1
Complaint to set aside fraudulent conveyance.....	3
Summons and return.....	10
Order to show cause and temporary restraining order....	12
Answer of S. G. Harvey, etc.....	14
Stipulation that copy of answer may be filed in place of original answer	22
Order granting injunction <i>pendente lite</i>	23
Memorandum opinion (De Haven, J.).....	24
Disclaimer of defendant, J. Downey Harvey.....	26
Opinion (Farrington, J.).....	27
Findings of fact and conclusions of law.....	46

	Page
Decree and judgment.....	54
Petition for order allowing appeal and order allowing appeal	57
Assignment of errors on appeal.....	59
Citation and service.....	72
Petition for writ of error and order allowing writ of error.....	73
Assignment of errors on writ of error.....	75
Writ of error.....	77
Citation and service on writ of error.....	79
Bond on appeal and writ of error.....	80
Statement of evidence to be included in the transcript on appeal by the defendant, S. G. Harvey.....	84
Statement of case by Mr. Schlesinger for plaintiff.....	84
Testimony of Burke Corbet	86
Edwin Adams Wasserman.....	99
James W. Crosby.....	119
Robert Finn	129
Mrs. S. G. Harvey before referee in bankruptcy	133
Edwin H. Williams.....	144
J. A. Schaertzer.....	146
J. Downey Harvey.....	148
Charles W. Fay.....	164
Mrs. S. G. Harvey.....	166
Exhibit 9—Memorandum	167
Testimony of Mrs. Ward Barron.....	174
Robert Finn (recalled).....	175
Charles W. Fay (recalled).....	175
Order approving statement of evidence on appeal.....	176
Stipulation to statement on appeal.....	176
Notice of having deposited stock certificate in accordance with order allowing appeal and supersedeas.....	178
Stipulation as to record on appeal.....	179
Order on stipulation as to record on appeal.....	180
Clerk's certificate	181
Citation and service on appeal.....	182
Writ of error.....	184
Return to writ of error.....	185
Citation and service on writ of error.....	186
Affidavit for extension of time to file record and docket cause	188
Order extending time to April 4, 1914, to file record thereof and to docket cause in appellate court.....	190
Affidavit for extension of time to file record and docket cause	191
Order extending time to March 29, 1914, to file record thereof and to docket cause in appellate court.....	193
Caption in circuit court of appeals.....	195
Order of argument and submission.....	195
Order filing opinion and decree.....	196
Opinion (Wolverton, J.).....	197

	Page
Decree	212
Order staying mandate.....	212
Petition for appeal and order of allowance.....	213
Assignment of errors.....	214
Bond on appeal.....	222
Prayer for reversal.....	223
Præcipe for transcript on appeal.....	224
Clerk's certificate	225
Citation and service.....	226
Citation and service.....	227



No. 2401

United States
Circuit Court of Appeals
For the Ninth Circuit.

S. G. HARVEY,

Appellant and Plaintiff in Error,

vs.

B. S. STOWE, as Trustee in Bankruptcy of the
Estate of J. DOWNEY HARVEY, a Bank-
rupt,

Appellee and Defendant in Error.

Transcript of Record.

Upon Appeal from and Writ of Error to the United States
District Court for the Northern District of
California, First Division.



*In the District Court of the United States, in and for
the Northern District of California, Division
Number One.*

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy, of the Estate
of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN
DOE, RICHARD ROE and JANE BLACK,
Defendants.

**Amended Praecipe for Transcript on Appeal and
Writ of Error.**

To the Clerk of Said Court:

SIR: Please make up, print and issue in the
above-entitled cause a certified transcript of the rec-
ord, upon an appeal, and upon a writ of error, both
allowed in this cause, to the Circuit Court of Appeals
of the United States, for the Ninth Circuit, sitting
at San Francisco, California, the said transcript to
include the following:

Complaint of plaintiff.

Summons.

Order to show cause and temporary restraining
order.

Answer of defendant S. G. Harvey.

Disclaimer of J. Downey Harvey. [1*]

Opinion of De Haven, District Judge, upon the issu-
ance of temporary injunction.

*Page-number appearing at foot of page of original certified Record.

Minute order made February 29, 1912, granting injunction *pendente lite*.

Opinion of the Court (Farrington, J.).

Findings of fact and conclusions of law.

Decree.

Petition for allowance of appeal and order endorsed thereon.

Assignment of errors on appeal.

Statement of evidence on appeal, with stipulation of parties and approval of Judge as annexed thereto.

Citation on appeal.

Petition for writ of error and order of allowance endorsed thereon.

Assignment of errors on writ of error.

Writ of error.

Citation on writ of error.

Bond on appeal and writ of error, filed or to be filed, in accordance with order increasing amount of bond, made December 11th, 1913.

Amended praecipe for transcript.

Stipulation for single transcript on appeal and writ of error, dated December 8, 1913, with order of allowance by Circuit Court of Appeals endorsed thereon.

Order extending time to file record and docket cause.

All of the above to be included in a single transcript prepared in accordance with the stipulation last mentioned and the order of the Circuit Court of Appeals endorsed thereon, and to be certified under the hand of the clerk and the seal of the Court. [2]

You will also please transmit to the said Circuit

Court of Appeals, with the record to be prepared as above, original citations on appeal and on writ of error.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Attorneys and Solicitors for Defendant and Appellant and Plaintiff in Error, S. G. Harvey.

[Endorsed]: Filed Mar. 30, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [3]

*In the District Court of the United States, in and for
the Northern District of California, Division
No. One.*

B. S. STOWE, Trustee of Bankruptcy of the Estate
of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN
DOE, RICHARD ROE, JANE BLACK,
Defendants.

Complaint to Set Aside Fraudulent Conveyance.

Now comes plaintiff and complains and alleges:

I.

That on the 2d day of November, 1910, certain creditors of J. Downey Harvey filed a petition in the above-entitled Court, praying that said J. Downey Harvey be adjudicated bankrupt, and that an order to show cause, directed to said J. Downey Harvey, was issued by said Court upon said petition, and that said order to show cause was thereafter duly served

upon said J. Downey Harvey and, in response thereto, he appeared and pleaded to said petition, and, after due proceedings had, he was, by an order and judgment of said Court duly given and made, duly and regularly adjudicated bankrupt, and the matter of his bankruptcy duly referred to Hon. A. B. Kreft, a duly and regularly appointed, qualified and acting Referee in Bankruptcy of the above-entitled court, for [4] further proceedings. That thereafter a meeting of the creditors of said J. Downey Harvey was called upon due and proper notice thereof, duly and regularly given, and that said meeting of creditors was regularly continued by the consent of all parties appearing thereat, until the 17th day of November, 1911, at the hour of 2 o'clock P. M. on that day, and that thereupon B. S. Stowe was duly and regularly elected Trustee in Bankruptcy of the Estate of J. Downey Harvey, a bankrupt, and his bond as Trustee fixed in the sum of Five Thousand Dollars, and that thereupon said B. S. Stowe duly gave bond as required and took his oath of office, and that said Hon. A. B. Kreft did, on the 20th day of November, 1911, duly make his order approving said bond, and that ever since said time said B. S. Stowe has been and is now, the duly elected, qualified and acting Trustee in Bankruptcy of the Estate of J. Downey Harvey, a bankrupt.

II.

That on the 26th day of November, 1909, J. Downey Harvey was the owner of five hundred and forty-six (546) shares of the capital stock of the Shore Line Investment Company, a corporation,

duly incorporated under and by virtue of the laws of the State of California, and that said shares of stock were at said time, ever since have been and now are of the value of One Hundred Nine Thousand Two Hundred (\$109,200.00) Dollars and upwards, and that since said date dividends have been regularly paid and collected upon said stock in the sum of Eleven Thousand Four Hundred and Eighty-six (\$11,486.00) Dollars.

III.

That on said 26th day of November, 1909, said J. Downey [5] Harvey gave to S. G. Harvey the above-described property and all of it and transferred to her all of said property. That said transfer was made wholly without consideration of any kind or character and that said S. G. Harvey did not confer or agree to confer any benefit whatever upon said J. Downey Harvey for the transfer of said property, or any of it, to her, nor did any other person, for or on behalf of said S. G. Harvey, confer or agree to confer any benefit whatever upon said J. Downey Harvey therefor. That said S. G. Harvey did not suffer any prejudice nor agree to suffer any prejudice, nor did any person whatsoever for her or on her behalf, suffer or agree to suffer any prejudice, for the transfer of said property or any part of it to said S. G. Harvey, but that said transfer was made by J. Downey Harvey to S. G. Harvey wholly without consideration of any kind, nature or form, and was purely voluntary.

IV.

That J. Downey Harvey was, on the 26th day of

November, 1909, wholly insolvent, and was unable to pay his debts, from his own means as they became due, and that all his assets, taken at a fair valuation, and all his property, taken at a fair valuation, was insufficient in amount to pay his just debts and liabilities. That said J. Downey Harvey was insolvent, as above set out, long prior to said 26th day of November, 1909, and that he ever since has been and now is insolvent. That S. G. Harvey knew, on the 26th day of November, 1909, and at the time of the transfer hereinabove described, well knew that said J. Downey Harvey was insolvent, and that said S. G. Harvey has at said times, knowledge of the financial condition of said J. Downey Harvey and knew that he was for a [6] long time prior to said date wholly unable to pay his debts, from his own means, as they became due and that the aggregate of his assets, taken at a fair valuation, were insufficient in amount to pay his just debts and liabilities.

V.

That the names of the defendants designated as John Doe, Richard Roe and Jane Black are and each of them is, unknown to plaintiff, and that the names so used to designate said defendants are fictitious, and plaintiff prays that he may be permitted to amend this complaint and all proceedings herein, by substituting the true names of said defendants for said fictitious names when he discovers the same. That said defendants, and each of them, claim some title to, interest in or lien upon the property herein described, but that said title, interest or lien, and

each of them is, subordinate to the title of plaintiff and subject to the claim herein set out.

VI.

That said S. G. Harvey threatens to, and will, unless restrained by the order of this Court, transfer the property described herein to some person who can claim to be a *bona fide* purchaser for value, and that the effect of such transfer, if made, would be to render said S. G. Harvey unable to respond to the judgment which may be rendered herein, and to make her wholly insolvent, and to deprive this plaintiff of all beneficial interest of every kind, character and form, in and to the above-described property.

VII.

That the transfer hereinabove mentioned was made by J. Downey Harvey to S. G. Harvey by delivering to her certain [7] certificates of the capital stock of said Shore Line Investment Company made out in the name of said J. Downey Harvey and certifying that he was the owner of 546 shares of the capital stock of said company. That when said certificates were delivered they were endorsed by said J. Downey Harvey so as to enable them to be transferred on the books of said company, and that they were thereupon presented to the proper officers of said company, and said certificates, so delivered, were cancelled and new certificates were thereupon issued by said company to said S. G. Harvey, certifying that she was the owner of said 546 shares of the capital stock of the Shore Line Investment Company.

VIII.

That at the time of the transfer hereinabove mentioned said J. Downey Harvey was largely indebted, in the sum of upwards of Two Hundred Thousand (\$200,000.00) Dollars to divers unsecured creditors who at said time were, ever since have been and now are, creditors of said J. Downey Harvey holding just and valid claims and debts against him, and that said indebtedness, and no part thereof, has ever been paid by said J. Downey Harvey, or any person whomsoever in his behalf, but that it, and the whole thereof, is and at all the times herein mentioned was, wholly due, owing and unpaid.

IX.

That all the creditors above named are represented by plaintiff in his capacity as Trustee of the estate of J. Downey Harvey, a bankrupt, and that plaintiff is now, and was, ever since the 20th day of November, 1911, the Trustee for all of said creditors. That all the assets and property of said J. Downey Harvey and of his estate in bankruptcy, are insufficient [8] to pay the creditors thereof, holding just and valid debts, the amount of their claims or anything more than two per cent of the amount thereof, and that said creditors, and all of them, and this plaintiff are greatly damaged by the aforesaid transfer, and are unjustly deprived of the value of the property so transferred.

X.

That said transfer, made as aforesaid, by J. Downey Harvey to S. G. Harvey, was made by him with the intent to delay and defraud the said creditors of

said J. Downey Harvey of their demands and that said transfer was accepted and taken by said S. G. Harvey with the intent and purpose to delay and defraud said creditors of their demands. That said transfer is fraudulent and void as to this plaintiff.

WHEREFORE, plaintiff prays, that said transfer be set aside, annulled and cancelled, and that it be adjudged and decreed to be utterly null and void, and that it be adjudged and decreed that plaintiff is the owner of all of said property, and that said defendants, and all of them, be enjoined and restrained from making any conveyance of said property, or any of it, or from collecting any dividends thereon, or from making or causing to be made any transfer of said property, or any of it, and that the claims of defendants, and all of them, to said property be adjudged to be subject to and subordinate to the title of plaintiff to said property; and that plaintiff recover his costs herein, and for such other and further relief as may be meet and equitable in the premises.

SCHLESINGER & SHAW,
EDWIN H. WILLIAMS,

Attorneys for Plaintiff. [9]

State of California,
City and County of San Francisco,—ss.

B. S. Stowe, being duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, that the same is true of his own knowledge, except as to the matters which are

therein stated on his information or belief, and that as to those matters he believes it to be true.

[Seal]

B. S. STOWE.

Subscribed and sworn to before me this 11th day of January, 1912.

A. J. HENRY,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jan. 11, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [10]

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

B. S. STOWE, Trustee in Bankruptcy of the Estate
of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN
DOE et al.

Defendants.

Summons.

Action brought in said Court, and the Complaint filed in the office of the Clerk of said District Court in the City and County of San Francisco.

The President of the United States of America,
Greeting: To J. Downey Harvey, S. G. Harvey,
John Doe et al., Defendants.

You are hereby directed to appear and answer the Complaint in an action entitled as above, brought

against you in the District Court of the United States, in and for the Northern District of California, within ten days after the service on you of this Summons—if served within this County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or he will apply to the Court for any other relief demanded in the Complaint.

WITNESS the Honorable JOHN J. DE HAVEN, Judge of said District Court, this 11th day of January, in the year of our Lord one thousand nine hundred twelve, and of our Independence the one hundred and thirty sixth.

[Seal]

JAS. P. BROWN,

Clerk.

By M. T. Scott,

Deputy Clerk. [11]

United States Marshal's Office,
Northern District of California.

I hereby certify, that I received the within writ on the 11th day of January, 1912, and personally served the same on the 11th day of January, 1912, upon J. Downey Harvey and S. G. Harvey, by delivering to and leaving with each of said J. Downey Harvey and S. G. Harvey, said defendants named therein personally, at the City and County of San Francisco, in said District, a certified copy thereof, together with a

copy of the Complaint certified to by attached thereto.

C. T. ELLIOTT,
U. S. Marshal.
By Elmo Warner,
Office Deputy.

San Francisco, Jan. 12, 1912.

[Endorsed]: Filed Jan. 15, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [12]

*In the District Court of the United States, in and for
the Northern District of California, Division
Number One.*

B. S. STOWE, Trustee in Bankruptcy of the Estate
of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN
DOE, RICHARD ROE and JANE BLACK,
Defendants.

**Order to Show Cause and Temporary Restraining
Order.**

Upon reading and filing the verified complaint of
plaintiff and good cause appearing therefrom;

IT IS HEREBY ORDERED that defendants
herein, J. Downey Harvey and S. G. Harvey,
appear before the above-entitled court, Division
Number One thereof, at its courtroom in the
United States Postoffice Building, Seventh and Mis-
sion Street, San Francisco, California, on Monday,

the 29th day of January, 1912, at the hour of 10 o'clock A. M. on that day, and there and then show cause, if any they have, why the above-entitled court should not issue a temporary injunction restraining said defendants and each of them, their agents, attorneys and servants, from transferring, assigning, hypothecating or pledging, or in any manner encumbering five hundred forty-six shares of the capital stock of the Shore Line Investment Company, a corporation, standing in the name of S. G. Harvey on the books of said corporation, or collecting or attempting to collect any dividends whatever upon said shares of stock or any part thereof.

And pending the hearing and determination of the foregoing order to show cause, **IT IS FURTHER ORDERED** that said defendants and each of them be, and they and each of them hereby are, restrained [13] and prohibited from transferring, assigning, hypothecating or pledging, or in any manner encumbering said shares of stock, or any part or portion thereof, either by themselves, their agents, attorneys or servants, and are further restrained and prohibited from collecting any dividends whatever upon said shares of stock or any part thereof.

Done in open court, January 19th, 1912.

R. S. BEAN,
Judge.

[Endorsed]: Filed Jan. 19, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [14]

*In the District Court of the United States, in and
for the Northern District of California, Division
No. 1.*

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate
of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY et al.,

Defendants.

Answer of S. G. Harvey (etc.).

Comes now S. G. Harvey, one of the defendants in the above-entitled action, and answering plaintiff's complaint herein, admits, denies, avers and alleges as follows:

I.

This defendant denies that on the 26th day of November, 1909, or at any time since the year 1905, J. Downey Harvey was, or has been, the owner of five hundred and forty-six (546) shares, or of any of the shares whatsoever, of the capital stock of the Shore Line Investment Company, mentioned in plaintiff's complaint.

This defendant denies that any five hundred forty-six (546) shares of the capital stock of the said Shore Line Investment Company ever have been, or now are, of the value of \$109,200 and upwards, or of any other sum in excess of \$50,000.

This defendant denies that any dividends have ever at any time been paid upon five hundred forty-

six (546) shares, or upon any shares, of the capital stock of said Shore Line [15] Investment Company owned by J. Downey Harvey at the time such dividends were paid.

II.

This defendant denies that on the 26th day of November, 1909, or at any time subsequent to the year 1905, the said J. Downey Harvey gave to this defendant, S. G. Harvey, the said, or any, five hundred forty-six (546) shares of the Shore Line Investment Company stock, or any part or portion thereof, or any dividend or dividends thereon, or that he, at any time subsequent to the said year 1905, transferred to this defendant all or any part or portion of the said stock, or any dividend or dividends thereon.

This defendant further denies that the said J. Downey Harvey ever, at any time, made to her any transfer of any shares of the capital stock of the Shore Line Investment Company at a time when the said J. Downey Harvey was insolvent.

This defendant avers that at all times in the year 1905 the said J. Downey Harvey was solvent, and was able to pay his debts from his own means as they became due, and that all his assets, taken at a fair valuation, and all his property, taken at a fair valuation, was sufficient in amount to pay his just debts and liabilities.

That while so solvent, as aforesaid, the said J. Downey Harvey, on or about the 26th day of June, 1905, acquired 300 shares of the capital stock of the said Shore Line Investment Company, and forthwith upon the issuance of a certificate therefor to him, he

duly endorsed such certificate, by writing his name upon the back thereof, and, on or about said 26th day of June, 1905, he delivered and gave the said certificate, and said shares represented thereby, to this defendant, who was at said time, ever since has been, and now is, his lawful wife. [16]

That while so solvent as aforesaid, the said J. Downey Harvey, on or about the 29th day of August, 1905, acquired 66 shares of the capital stock of the said Shore Line Investment Company, and forthwith upon the issuance of a certificate therefor to him, he duly endorsed such certificate, by writing his name upon the back thereof, and on or about the said 29th day of August, 1905, he delivered and gave the said certificate and said shares represented thereby, to this defendant, who was at said time, ever since has been, and now is, his lawful wife.

That while so solvent, as aforesaid, the said J. Downey Harvey, on or about the 25th day of September, 1905, acquired 180 shares of the capital stock of said Shore Line Investment Company, and forthwith upon the issuance of certificates therefor to him, he duly endorsed such certificates, by writing his name upon the back of each thereof, and on or about the said 25th day of September, 1905, he delivered and gave the said certificates, and each of them, and the said shares represented thereby, to this defendant, who was at said time, ever since has been, and now is, his lawful wife.

That said respective deliveries of said shares and certificates were made in consideration of the natural love and affection which the said J. Downey Har-

vey bore to this defendant, and were made with the intent to pass the absolute title to the said shares of stock to this defendant, and of making gifts thereof to her. That this defendant then and there, at the respective times of said deliveries, accepted said gifts of the said shares and received into her possession said stock certificates evidencing the same, and ever since has been the owner and holder thereof.

That on or about the 26th day of November, 1909, this defendant caused said shares to be transferred into her name [17] upon the books of the said Shore Line Investment Company. That a new certificate therefor was thereupon issued to her in her name, and was thereupon forthwith delivered to her by said Shore Line Investment Company, and she ever since has continued to be and now is the owner and holder thereof, and in the possession thereof.

III.

That no dividends had ever been declared upon the said stock prior to the said 26th day of November, 1909, but that since the said 26th day of November, 1909, divers dividends thereon have been declared, all of which said dividends, amounting in the aggregate to \$11,486.00, have been paid to *this* defendants.

IV.

This defendant admits that the transfer so made to her by the said J. Downey Harvey was made by delivering to her certain certificates of the capital stock of the Shore Line Investment Company, made out in the name of J. Downey Harvey, certifying that he was the owner of shares of the capital stock of said Shore Line Investment Company,

amounting in the aggregate to five hundred forty-six (546) shares, and that when said certificates were delivered, they were endorsed by the said J. Downey Harvey so as to enable them to be transferred on the books of said Shore Line Investment Company, but this defendant denies that said transfer of said shares of stock, or any part or portion thereof, by the said J. Downey Harvey to her was made on the 26th day of November, 1909, or at any time later than the year 1905.

V.

This defendant has no information or belief on the subject sufficient to enable her to answer the allegations that the said J. Downey Harvey was, long prior to the 26th day of [18] November, 1909, insolvent, as set out in Paragraph IV of plaintiff's complaint herein, and, basing her denial on that ground, this defendant denies that the said J. Downey Harvey was long, or at any time, prior to the 26th day of November, 1909, insolvent, as alleged, or that he was insolvent on said 26th day of November, 1909.

This defendant denies, upon and according to her information and belief, that the said J. Downey Harvey was insolvent at any time in the year 1908, or at any time prior thereto.

VI.

This defendant has no information or belief sufficient to enable her to answer the allegation of plaintiff that the defendants sued by fictitious names herein claim some title to, interest in, or lien upon, the property herein described, and, basing her denial on that ground, this defendant denies that the

defendants designated in said complaint as John Doe, Richard Roe, and Jane Black, or any or either of them, claim some or any title to, interest in, or lien upon the shares of stock described in plaintiff's complaint.

This defendant denies that said defendants so sued by fictitious names herein, or any or either of them, have or has any title to, interest in, or lien upon the property described in plaintiff's complaint, or that said, or any, title, interest, and lien, or title or interest or lien, is subordinate to the title of plaintiff, or that plaintiff has any title to, interest in, or lien upon the said shares of stock, or any part or portion thereof.

VII.

This defendant denies that she has threatened to, or that she will unless restrained by the order of this Court, transfer the property described in plaintiff's complaint, or any stock in the Shore Line Investment Company held by her, to some [19] person who can claim to be a *bona fide* purchaser for value, or to any person at all, and in this behalf this defendant avers that she has no present intention to sell or dispose of her said shares of stock.

VIII.

This defendant further denies that the effect of any transfer which she might make of the said stock would be to render her unable to respond to any judgment which might be rendered herein, or to make her wholly or at all insolvent, or to deprive plaintiff of all or any beneficial interest whatever in or to the property described in plaintiff's complaint.

IX.

Answering the allegations of paragraph VIII of the said complaint, this defendant denies that any transfer was made to her of the said five hundred forty-six (546) shares, or of any shares, of stock of the Shore Line Investment Company by the said J. Downey Harvey at any time subsequent to the year 1905.

This defendant denies that in the year 1905, at the time that the said gift was made to her as aforesaid, said J. Downey Harvey was at all in debt.

X.

Answering the allegations of paragraph X of said complaint, this defendant denies that any transfer of any stock in the Shore Line Investment Company was made to her on the 26th day of November, 1909, by the said J. Downey Harvey, or at any time subsequent to the year 1905.

XI.

This defendant denies that any transfer ever made to her by the said J. Downey Harvey of any shares of stock of the Shore Line Investment Company was made by him with the intent and purpose, or intent or purpose, to delay and defraud, or to delay or defraud, the alleged, or any, creditors of the said [20] J. Downey Harvey, of their or any of their demands, or of any demand, or that any transfer of shares of stock of the said Shore Line Investment Company from the said J. Downey Harvey to this defendant was ever at any time accepted and taken, or accepted or taken, by this defendant with the intent and purpose, or with the intent or purpose, to delay and de-

fraud, or to delay or defraud, said or any creditors of their demands, or that any transfer made to this defendant by the said J. Downey Harvey of any shares of stock in the said Shore Line Investment Company was fraudulent and void, or fraudulent or void, as to the plaintiff, or any other person or persons.

WHEREFORE, this defendant prays that plaintiff take nothing by his said complaint, and that she be hence dismissed with her costs of suit.

CHARLES S. WHEELER and

JOHN F. BOWIE,

Attorneys for S. G. Harvey. [21]

State of California,

City and County of San Francisco,—ss.

S. G. Harvey, being duly sworn, deposes and says: That she is one of the defendants in the above-entitled action; that she has read the foregoing answer and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated on her information or belief, and as to those matters that she believes it to be true.

S. G. HARVEY.

Subscribed and sworn to before me this 30th day of January, 1912.

[Seal]

ALICE SPENCER,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Receipt of a copy of the within An-

swer, this 19th day of February, 1912, is hereby admitted.

SCHLESINGER & SHAW,
E. H. WILLIAMS,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 19, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [22]

*In the District Court of the United States, in and for
the Northern District of California, Division
No. 1.*

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate
of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY et al.,

Defendants.

**Stipulation [That Copy of Answer may be Filed in
Place of Original Answer].**

The original answer of the defendant, S. G. Harvey, in the above-entitled cause, having been apparently misplaced in the office of the Clerk of the above-entitled court, in connection with making up the record on appeal in said cause;

IT IS HEREBY STIPULATED by and between the parties to the above-entitled action, and their respective attorneys undersigned, that the foregoing copy of the answer of S. G. Harvey, originally filed in the cause, is a full, true and correct copy of the

same and the endorsements thereon, and the said copy may be filed in the office of the Clerk of the court in place of the original, and with the same force and effect as the original answer.

Dated April 3, 1914.

SCHLESINGER & SHAW,

E. H. WILLIAMS,

Attorneys for Plaintiff.

CHARLES S. WHEELER and

JOHN F. BOWIE,

Attorneys for Defendant. [23]

[Endorsed]: Filed Apr. 3, 1914. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [24]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Thursday, the 29th day of February, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 15,222.

B. S. STOWE, etc.,

vs.

J. DOWNEY HARVEY et al.

Order Granting Injunction Pendente Lite.

The hearing on the order to show cause issued herein against defendants, why an injunction *pendente lite* should not issue enjoining the sale or incumbering of 546 shares of the capital stock of the

Shore Line Investment Company, standing in the name of S. H. Harvey, or the collections of dividends thereon, this day came on for hearing, A. E. Shaw, Esqr., appearing for plaintiff and Charles S. Wheeler, Esqr., for respondent, and after hearing affidavits read and arguments of respective counsel, by the Court ordered that the application for said injunction be, and the same is hereby submitted to the Court for determination, and thereupon, after due consideration had, the Court filed its memorandum opinion, and by the Court ordered that said application be, and the same is hereby granted. [25]

In the District Court of the United States, for the Northern District of California, First Division.

No. 15,222.

B. S. STOWE, Trustee, etc.,

Plaintiff,

vs.

J. DOWNEY HARVEY et als.,

Defendants.

Memorandum Opinion—De Haven, District Judge.

DE HAVEN, District Judge.

This is an application for an injunction *pendente lite*. In the case of Southern Pacific Co. et al. vs. Earl, 82 Fed. 690, the Circuit Court of Appeals for this district said:

“The order for such an injunction does not finally determine the rights of the parties to the action, and its only purpose and effect are to

preserve the existing state of things until the case has been fully heard by the Court, and the entry of a final decree therein. And it is equally well settled that the granting of a provisional injunction rests in the sound discretion of the trial court, and that it is not necessary that the Court should, before granting it, be satisfied from the evidence before it that the plaintiff will certainly prevail upon the final hearing of the cause. On the contrary, to adopt the language of the Court in *Georgia vs. Brailsford, a Dal.* 402, 'a probable right, [26] and a probable danger that such right would be defeated without the special interposition of the Court,' is all that need be shown as the basis for such an order."

* * * * *

"If there was before the Court evidence having a reasonable tendency to make out a *prima facie* case for the plaintiff, the order granting the injunction will generally be affirmed, notwithstanding there may have been a material conflict in the evidence submitted to the Court at the time of making its order."

There is certainly a very material conflict in the affidavits filed upon the present hearing, and I do not now express any opinion as to the weight to be accorded the several affidavits or as to the merits of the controversy raised by the bill of complaint and the answers thereto. It is sufficient to say that under the rule stated in the case of *Southern Pacific Co. vs. Earl*, above quoted, I deem it a proper exer-

cise of discretion to grant the preliminary injunction asked for in order that the existing state of things may be preserved until such time as the case shall have been fully heard before the Court and a final conclusion reached as to the matters in issue.

[Endorsed]: Filed Feb. 29, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [27]

*In the District Court of the United States in and for
the Northern District of California, Division
No. One.*

B. S. STOWE, Trustee in Bankruptcy of the Estate
of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN
DOE, RICHARD ROE and JANE BLACK,
Defendants.

Disclaimer of Defendant J. Downey Harvey.

Comes now J. Downey Harvey, one of the defendants in the above-entitled action, and disclaims any interest of any kind whatsoever in any of the shares of the capital stock of Shore Line Investment Company, mentioned in the complaint in the above-entitled action.

COOPER, GRAY & COOPER,
GRAY & COOPER,

Attorneys for Defendant J. Downey Harvey.

Received copy of within this 13th day of March,
1912.

SCHLESINGER & SHAW,
EDWIN H. WILLIAMS,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 13, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [28]

*In the District Court of the United States, in and
for the Northern District of California.*

B. S. STOWE, Trustee, etc.,

Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY et al.,
Defendants.

Opinion—Farrington, District Judge.

EDWIN H. WILLIAMS, SCHLESINGER &
SHAW, for Plaintiff.

CHARLES S. WHEELER and JOHN F.
BOWIE, for Defendant, Sophie G. Harvey.

FARRINGTON, District Judge.

A petition was filed in this court November 2d, 1910, by certain creditors of J. Downey Harvey, praying that he be adjudged bankrupt, and in due course such an adjudication was made. This suit is brought by B. S. Stowe, the trustee in bankruptcy, against said bankrupt and his wife Sophie G. Harvey, to procure a decree that plaintiff is the owner of 546 shares of the capital stock of the Shore Line Investment Company, alleged to have been fraudu-

lently transferred by said Harvey to his wife.

The allegations of the complaint are that on the 26th day of November, 1909, J. Downey Harvey, being then the owner of said stock, which was of the value of \$109,200, transferred and delivered the same to his wife without any consideration whatever; that at the time all his property taken at a fair valuation, was insufficient to pay his just debts; and that S. G. [29] Harvey then knew that her husband had been insolvent for a long time prior to said transfer.

It is admitted that the value of the stock is \$50,000; that on the 26th day of November, 1909, it was transferred into the name of Sophie G. Harvey on the books of the corporation; but it is claimed that the actual gift to Mrs. Harvey occurred in 1905, and that the stock certificates had been in her exclusive possession for more than four years prior to actual transfer on the corporate books.

Defendants aver that about June 26th, 1905, Harvey acquired 300 shares of this stock, which he then transferred to his wife by endorsing the certificate, and delivering it to her. About August 29th, 1905, he acquired 66 shares, which he then transferred to his wife by endorsing the same in blank, and delivering the certificate; and about September 25th, 1905, he acquired 180 shares, which he transferred in the same manner to his wife; that at all these times he was solvent; and that the said Sophie G. Harvey at the respective times of said deliveries accepted said gifts of stock, and received the certificates into her possession.

It is admitted that Sophie G. Harvey since November 26th, 1909, has received in dividends on this stock \$11,486. It is alleged in the bill, and not denied in the answer, that Harvey on that date was indebted in the sum of \$200,000 to divers unsecured creditors, who are still unpaid, and that all the assets of his estate in bankruptcy are insufficient to pay more than 2 per cent of their claims. Mr. Harvey testifies that he is indebted to no one who was his creditor in 1905. This is not disputed.

The principal question is, when did the stock certificates [30] come into the possession of Mrs. Harvey? Her counsel in the course of the trial said, "We make no claim as to that stock unless it was given to Mrs. Harvey in 1905."

Under Section 3440 of the Civil Code of California, unless the gift of Mrs. Harvey was accompanied by an immediate delivery, and followed by an actual and continuous change of possession of the stock certificates, it will be conclusively presumed to be fraudulent, and therefore void against those who were his creditors while he was in possession. No case has been called to my attention, nor have I been able to discover one in which it is held that the possession of a stock certificate, endorsed in blank but not transferred on the books of the company, is not possession within the meaning of the section of the Code referred to. Consequently, if it be assumed or established, that the stock certificates in question, endorsed in blank, were actually given to Mrs. Harvey in 1905, and continuously retained in her custody and possession until November, 1909, when for the

first time there was a transfer to her on the books of the corporation, I shall hold that her possession constituted that actual and continuous change of possession of the stock itself, which avoids the code provision referred to.

Mr. Harvey testifies that he purchased this stock with his own money, and it is admitted there was no other consideration for the transfer to Mrs. Harvey than love and affection. He kept a set of private books in which were recorded, among other matters, transactions with his wife. These books are in evidence, and show the stock in question to have been his up to November 26th, 1909; prior to that date no mention was made in the books of any transfer or gift of this stock to his wife in June, 1905. In the ledger there is an account of "Family [31] gifts and allowances." In this account are recorded a number of gifts made by Harvey to his wife long prior to 1909, but there is no record of any gift of the shares of stock in question. Some time in 1909 or 1910, Mr. Harvey's bookkeeper Crosby wrote in the ledger, referring to the Shore Line Investment Company stock, "This is the property of Mrs. H., and belongs to her." The journal contained no entry in regard to this stock until after November 26th, 1909. In the book of trial balances, in February, November and December, 1906, January, 1907, February and March, 1908, and October, 1909, this stock is carried as the property of Mr. Harvey. This trial balance book shows that it was listed in the year 1905 as Harvey's stock, and in each and every succeeding year continuously, until and including Octo-

ber 1, 1909. In the succeeding trial balance of March 31, 1910, the stock is dropped for the first time from the list of Harvey's assets.

Prior to November, 1909, the stock in question all stood on the books of the Investment Company in the name of Mr. Harvey. Each certificate was issued to him in his name, and paid for by him with his own money. By virtue of this apparent or actual ownership of the stock, he was president of the company after 1906. Prior to November 26th, 1909, when the certificates issued to Mr. Harvey were returned and cancelled, and new certificate issued in lieu thereof to Mrs. Harvey, Mr. Harvey seems to have exercised a control and dominion over the stock as complete and effectual as though it were his individual property. At various meetings of the stockholders of the company at which he was present, he represented 546 shares of stock in his own name. At the meeting of April 25th, 1907, he represented these 546 shares in his own name, and also 1692 shares by proxies [32] from fourteen several stockholders. As a stockholder he signed documents and resolutions of the company in which it was recited that the signers were owners and holders of certain shares of stock. The stock was carried in his private books of account—his journal, ledger and trial balance book—as his individual property.

Prior to November, 1909, there was not a suggestion in these books that the stock belonged to Mrs. Harvey. April 15th, 1907, Harvey paid an assessment of \$10 per share, or \$5,460, on this stock. This amount was not charged to Mrs. Harvey, though less

than two months before he had paid a \$500 assessment on her Ocean Shore stock, with which she was debited. January 11th, 1907, he gave his wife \$200 in cash; this also was charged against her. Mr. Harvey explains this circumstance by saying that he intended that \$5,460 as a gift; but notwithstanding this intention, this very \$5,460 appears among his assets in his trial balances for February, 1908, and March and October, 1909; and also in the statement of his affairs, which was prepared at his request by his bookkeeper September 22d, 1907. Mr. Harvey attempts to avoid the obvious inference from these entries by saying that his attention was entirely engrossed with the affairs of the Ocean Shore Railway Company; that he "seldom examined his ledger"; the bookkeepers kept the books as they saw fit; he was not in the habit of examining his trial balances—"I have no interest in them"; the purpose in maintaining bookkeepers was "to write up my books once in a while, look after them, and mostly my check-book, which they took care of, and that I always had written up every month to know my condition."

"Q. Did you examine your trial balances in 1906? A. I have no recollection of it. Q. Did you ever have occasion [33] to examine your trial balances during the years 1905, 1906, 1907, 1908, 1909 and 1910? A. I never knew of this book at all. Q. Did you ever examine the journal or ledger with respect to your Shore Line Investment Company stock? A. I never had occasion to. Q. Did you ever have occasion to look into your ledger during these years? A. Not in relation to the Shore Line Investment

Company's stock. Q. Did you ever have occasion to look into your ledger and journal with respect to your other investments? A. I might have; I don't remember of having looked them up."

It is hardly credible that Mr. Harvey should have been so indifferent as to the contents of his account-books. Mr. Wasserman, his bookkeeper prior to April, 1907, whose loyalty to Mr. Harvey is evident, says that he sometimes discussed entries in the books with Mr. Harvey; that it was Mr. Harvey's habit to give pencil memoranda in order that particular entries could be made, and that Mr. Harvey must have had knowledge of the entries in the trial balance book. Mr. Wasserman's statement, dated September 22d, 1907, is also a fact of significance bearing on Mr. Harvey's knowledge that in his books this stock was being carried as his asset, and not as the property of his wife. Mrs. Barron, a daughter of Mr. and Mrs. Harvey, testifying as to a conversation with her mother which occurred in 1907, shows that Mrs. Harvey worried very often at that time about the affairs of the Ocean Shore Railway Company, of which Mr. Harvey was president, and in which he had invested heavily. The nature and cause of the worry is revealed in the daughter's question, "I asked her if she didn't have anything of her own that would be very valuable." It was earlier in this same year, under date of September 22d, that Mr. Wasserman wrote Mr. Harvey thus: "In order to give you the statement you desire [34] with regards your affairs, have gone thoroughly over your accounts." Following this in the letter there is an itemized list

of Mr. Harvey's liabilities, amounting to \$745,944.37; an itemized statement of his monthly interest charge, amounting to \$3,320.29, and also of his average monthly income amounting to \$3,950.95. Following this there is a list of his assets among which is the item "Santa Cruz Beach Company \$4,000, less half given Mrs. Harvey, \$2,000." The letter concludes thus:

"Besides the above you should take into consideration the following:

Due from Rogers for three assessments paid Ocean Shore Stock secured by Stock and bonds	\$ 12,420.00
Ocean Shore Rwy. Co.—Cash put in not including assessment No. 3.....	283,613.17
Ocean Shore Bonds Given in payment Assessment No. 3	55,000.00
Shore Line Inv. Co.	23,610.00
Following Nevada Mining Ventures representing cash paid in:	
Forward	374,643.17
Ex. Bullfrog Banner.....	\$5,000
Midas Bullfrog	8,750
Bullfrog Banner less 1/2 given S. H. G.	1,500
	<hr/>
	15,250.00
	<hr/>
	\$389,393.17
Assets on previous page...	\$993,394.30
" above	389,393.17
	<hr/>
	\$1,383,287.67

"Your liabilities are \$745,943.37 and your assets the above amount which show very well on paper but the trouble is the assets are given at a fair valuation, but if turned into cash if it was absolutely necessary to meet your obligations they would not bring that figure, you know.

"I would advise a careful study of the above with a view of disposing of all your assets that you possibly can at a valuation a little in advance of the above if possible, and paying off the debts as fast as possible. For although the liabilities are only a trifle over half the assets the interest and income about balance.

"If the various small properties and even the bigger ones could be turned into cash and applied on the indebtedness, I think everything will turn out for the best.

"I forgot to mention the amount of \$2,144.31 which the Ocean Shore owes you for expenses of Eastern trip when you tried to sell bonds last year.

"If you wish to see me about the above to-morrow please telephone me."

The Ocean Shore Railway Company, which was soon to go into the hands of a receiver, was evidently a cause of anxiety, both to the husband and the wife. At practically the same time the wife, fearful that her husband's fortune would be wrecked, was worrying about her own future, and he was demanding from his bookkeeper a statement of his affairs. Under such circumstances it is unreasonable to suppose that he did not examine the statement with care when it was handed to him, and that he was not at the time fully apprised of the fact that the stock in ques-

tion was being carried on his books as his own property. If this stock actually belonged to Mrs. Harvey, [36] and the fact was known to Mr. Wasserman as well as to Mr. Harvey, why was it not excluded from the list of assets, as was the half interest in the Santa Cruz Beach Company, "given Mrs. H."?

Much stress is placed on Mr. Crosby's testimony that Mr. Harvey told him in the spring of 1907 the stock was Mrs. Harvey's. The weight to be given this testimony, as well as the weight which Mr. Crosby himself attributed to the statement made by Mr. Harvey, must be considered in connection with the fact that as Mr. Harvey's bookkeeper after April, 1907, he continued to include this very stock among Mr. Harvey's assets in the trial balances prepared by him, of February, 1908, and March and October, 1909. It was not until March, 1910, after the stock had actually been transferred to Mrs. Harvey on the books of the corporation, and after Mr. Harvey's insolvency was apparent, that Crosby entered on Mr. Harvey's books the statement that this stock had been purchased four years before for Mrs. Harvey.

Mr. Corbet testifies that he had a conversation with Mr. Harvey prior to the issuance of any stock in the Shore Line Investment Company, in which Mr. Harvey said he was buying the stock, and was giving it to Mrs. Harvey, and that after the stock was issued Mr. Harvey told him a number of times that the stock was given to Mrs. Harvey.

Charles W. Fay, general manager of the Shore Line Investment Company after January, 1906, testified that about the time he entered the employ of

the company, Mr. Harvey told him that the stock was Mrs. Harvey's, and that again in October and November, 1909, similar statements were made.

These declarations to the effect that the stock was Mrs. Harvey's are of little assistance in determining at what time the stock was actually delivered to her. The statements may [37] be entirely consistent with plaintiff's contention that the stock was not actually delivered until November 26th, 1909. The statements to Mr. Fay in October and November, 1909, were made within a few days, or weeks at most, of the time when the stock was transferred to Mrs. Harvey on the corporate books. Then Mr. Harvey was insolvent, and this fact was undoubtedly known to both husband and wife. His statement under such conditions may have been inspired by a desire to protect his wife. Certainly it is entitled to little weight in determining whether Mrs. Harvey had had control and exclusive possession of the stock certificates for the previous four years.

In Mr. Harvey's ledger there is an account entitled "Shore Line Investment Company," directly under this heading are the words "This stock was purchased for Mrs. Harvey and belongs to her." Testifying before the referee in December, 1911, Mr. Harvey said that this notation "was made when Mr. Crosby took charge of my books. I told him the conditions of the different properties when he got my books, and he made notations on it for that purpose." A few months later, in April, 1912, in testifying in this case, Mr. Harvey said, "It was made by Mr. Crosby. I should imagine it was made shortly after he took

charge of my books; as to that I could not say." "I should imagine it was when he came there, or whenever he called my attention to my books in any way." And in response to a question as to whether he told Mr. Crosby the condition of his properties when Mr. Crosby took charge of the books, Mr. Harvey replied, "I don't know whether I did or not. I suppose those things speak for themselves." Mr. Crosby, after considerable cross-examination, admitted that the entry was not made until March, 1910, more than three months after the actual transfer of the stock to Mrs. Harvey. Why he neglected to make the entries in Mr. Harvey's books, and why these [38] books until March, 1910, failed to contain any suggestion whatever that his stock, or any interest in it, had been transferred to Mrs. Harvey is difficult to understand, if he had been directed several years before, as he says, to make such a notation.

Mrs. Harvey's claim to the stock rests on her alleged possession of the certificates, beginning in 1905. If actual delivery did not occur until November 26th, 1909, when the stock was transferred to her on the books of the corporation, the defense fails. Her account of her acquisition of the certificates is far from satisfactory. On examination before the referee in bankruptcy, December 5th, 1911, she testifies as follows:

"In 1905 Mr. Harvey told me that he was going to give me stock in the Shore Line Investment Company, and he gave me, in June of 1905, 300 shares. He told me as he acquired more he would give them to me; and the reason that he kept them in his own

name was because he was a big holder in the Ocean Shore and that would show his interest in the Shore Line Investment Company, if he kept them in his name. In August he gave me 66 shares. In September he gave me 160 shares and 20 shares, and I put them in my box. . . . Q. Mrs. Harvey, you say he gave you the stock at the respective months that you named in 1905? A. Yes. Q. What do you mean by saying that he gave you the stock? A. He gave me the certificates. Q. What was the form of the certificates? A. They were like common certificates, and they were endorsed by him. Q. What did you do with the certificates? A. Put them in the Safe Deposit of the First National Bank. Q. You had a box in the safe deposit vault there? A. I had always a box in the safe deposit vault there. Q. How is it you remember the dates at which [39] these certificates were given to you? A. Because I put them down on a memorandum. Q. Did you keep a memorandum of all these things? A. Yes, I did. Q. You say that the first of these certificates was given to you in June of 1905? A. Yes. Q. And he did actually deliver to you a certificate of stock at that time? A. He did. Q. Did he tell you anything further about it? A. No, he said that I was to take it and put it in my box. Q. And you did that? A. I did that. Q. You took that at that time? A. Yes, at that time. Q. You are sure the date was June, 1905? A. I beg your pardon? Q. You are sure of the date as being June, 1905? A. Yes, I am. Q. In relation to this certificate of 66 shares to make Mr. Folger a director, when did Mr. Harvey first have a

conversation with you in that regard? A. Why, about the time of it. That was December, 1906. Q. In December, 1906? A. Yes. Q. And what did he say to you then and what did you say to him? A. He said that he wanted this stock certificate for 66 shares in order to make Mr. Folger a director; and I went to my box and got the certificate for 66 shares, and gave it to Mr. Harvey. Q. That was in what month? A. That was in December, 1906. Q. How did you receive it back again? A. I received it back again endorsed by Mr. Folger's name, and put it in my box. Q. It stood in his name on the books? He endorsed it to you and it was put in your safe deposit box? A. Yes."

Here we have a positive statement that she received the stock at certain dates in 1905, and placed it in her safety deposit box in the First National Bank.

One or two days after the foregoing testimony was given, an attempt was made in the proceeding before the referee in bankruptcy to introduce evidence showing the dates when Mrs. [40] Harvey's safe deposit box had been opened subsequent to June 1st, 1905. The Safety Deposit Company strenuously objected to giving the testimony, but on December 19th, 1911, while Mr. Moffat, an official of the company was again on the witness-stand and being questioned as to the same matter, Mr. Harvey produced a letter from Mrs. Harvey addressed to E. H. Williams, one of the attorneys, which in part is as follows:

"If you wish to learn from the safe deposit company the dates on which I visited my safe deposit box, I have no objection whatever, and am perfectly

willing that the bank officials shall give you the information, and you may tell them so for me. I do not myself know the exact dates of my visits. I have, of course, been there a number of times since 1905, but I have at all times had a safe of my own wherever I have been living, whether here or at Monterey, and I kept many of my papers in these safes, and, as I think it over, I am positive I kept my certificates of stock there instead of in my safe deposit box."

In a subsequent examination before the referee January 5th, 1912, Mrs. Harvey testified that she never had kept the Shore Line Investment Company stock in the safety deposit box, but it always rested in a portable safe which she kept first at the family home in San Francisco, and later in her rooms in the hotel at Monterey; that she had her valuable papers and jewels in this safe, and placed in the safety deposit box only a few letters, a number of antiques, several old deeds, and the wills of herself and Mr. Harvey. Except herself, her maid, Miss Anderson, alone had the combination to the safe. December 5th, Mrs. Harvey was certain that she deposited the stock in the safe deposit box in the First National Bank, but after the trustee made an effort to put in evidence [41] the records of the bank disclosing the fact that Mrs. Harvey had never visited her box at all between June 1st and December 31st, 1905, and during that period there were but three admissions to the box, namely, July 15th, July 17th and November 8th, by Lizzie Anderson, Mrs. Harvey's maid, she remembered the stock had never been deposited elsewhere than in her portable safe. No record is kept of

what was placed in that safe. No one but Mrs. Harvey ever had access to it, except Lizzie Anderson. Lizzie Anderson is not produced as a witness, and her absence is not accounted for. Mrs. Harvey was very positive when testifying December 5th that she received the certificate for 300 shares in June, 1905; later it transpired that she was probably in New York at that very time.

It appears from the evidence that Mrs. Harvey visited her portable safe repeatedly during the time which intervened between June 1st, 1905, and the date of her testimony before the referee. On three different occasions in 1905 she placed stock therein. April 13th, 1907, Mr. Harvey paid the assessment on this stock, and subsequently procured the certificates from Mrs. Harvey in order that the payments might be stamped on them. At that time, if her story is true, she must have taken the certificates from the portable safe, and later returned them. She certainly knew at that time that she had not placed them in the safe deposit box. In December, 1906, she gave the certificate for 66 shares to Mr. Harvey to be transferred to Mr. Folger; later it was returned. In October or November, 1909, she handed all the certificates to her husband to be given to Mr. Fay to enable him to negotiate a loan on all the stock of the corporation for the benefit of the company. The stock was returned to her by Mr. Harvey, and later, on the 26th day of November, 1909, [42] he again received it all from her, to be cancelled and transferred on the books of the company. During all this period her jewelry, and practically all her important papers were kept in

this safe, and yet during the short interval of less than twenty-five months, between November 26th, 1909, and December 5th, 1911, the fact that the stock in question had been kept in the safe, and repeatedly taken therefrom and returned to that depository, was entirely forgotten. If she ever had the certificates in her possession, her habit of placing valuable documents in her safe, unaided by memory of specific circumstances, should have prompted a different answer. It is unfortunate that she did not discover her error until the records of the Safe Deposit Company were called for. It is equally unfortunate that her portable safe keeps no records, that no human being has testified that he ever saw the certificates in the safe, or in her possession, prior to November 26th, 1909, except her husband; that there is in evidence absolutely no contemporaneous record, either in the books and papers of the corporation, or of Mr. Harvey or Mrs. Harvey, or elsewhere, which intimates that Mrs. Harvey had possession of the stock certificates in question prior to November 26th, 1909.

When asked how she remembered the dates at which the certificates were given, Mrs. Harvey replied, "Because I put them down on a memorandum." She kept a memorandum of all these things; each entry was on a separate slip of paper. These slips were subsequently destroyed, after being copied on a single sheet of paper. The copy only is in evidence. Later, she testified that the dates were the dates of the certificates, not the dates of their receipt, and that each memorandum was made on the date

when the corresponding certificate was received.
[43]

It is difficult to avoid the suspicion that this change in Mrs. Harvey's testimony was made in order to escape the effect of the evidence showing that she was in New York in June, 1905, at the time she says she received the certificate for 300 shares from Mr. Harvey.

A peculiar feature of this transaction is the fact that for more than four years Mrs. Harvey's ownership of the stock in question was concealed from the public. Mr. Harvey attempts to explain this by saying that he was very largely interested in the Ocean Shore Railroad, and wished to show the people that the Ocean Shore Railroad was interested in the success of the Shore Line Investment Company, and that he was a large holder in it, and would be ready to help it out. Why the same good impression could not have been conveyed by publishing the fact that his wife was a large holder in the Shore Line Investment Company does not appear.

Objection is made that the acts, conduct and declarations of Mr. Harvey subsequent to the delivery of the certificates to Mrs. Harvey in 1905 are not admissible in evidence to impeach her title. This objection would be good if the actual physical delivery of the certificates to Mrs. Harvey at that date, and her exclusive possession thereafter, were conceded or established. This, however, is not the case. Whether Mr. Harvey ever surrendered possession of the certificates, and gave the stock to her in 1905, is

the controlling issue, and as to this the evidence is admissible.

In the complaint it is alleged, and by admissions and evidence established, and I so find, that on the 26th day of November, 1909, Harvey, in person, surrendered the stock and caused it to be transferred on the books of the Investment Company to Mrs. Harvey. The old certificates were cancelled, and new [44] ones were issued to her in lieu thereof. At that time Harvey was hopelessly insolvent, and this fact was known to him and to his wife. The transfer was made and received with intent to delay and defraud Mr. Harvey's creditors, and without other consideration than love and affection.

Bankruptcy proceedings were commenced in this Court against the said Harvey, November 2d, 1910. The answer of Mrs. Harvey is that the stock was given to her in 1905, instead of 1909, and the certificates thereafter were indorsed in blank by her husband, and by him delivered to her in 1905, without intent to delay or defraud his creditors, and at a time when he was solvent. She also declares that ever since 1905, she has retained the exclusive possession of the certificates.

That the delivery was made in 1905 is an affirmative defense, and is a matter which was peculiarly within the knowledge of Mr. and Mrs. Harvey. It has not been proven, and the evidence, in my opinion, preponderates against her, and against her contention.

Let a judgment and decree, as prayed for in the bill of complaint, be entered in favor of the plaintiff.

[Endorsed]: Filed Aug. 6, 1913. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [45]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE and JANE BLACK,
Defendants.

Findings of Fact and Conclusions of Law.

This cause came on regularly to be heard before the Court, the parties being represented by their respective counsel, evidence, oral and documentary, was offered and received on behalf of the respective parties and the cause was submitted on briefs of counsel to be thereafter served and presented, and the Court having duly considered the cause, now finds the facts as follows:

I.

That on the 2d day of November, 1910, certain creditors of J. Downey Harvey filed a petition in the above-entitled court praying that said J. Downey Harvey be adjudicated a bankrupt and that an order to show cause, directed to said J. Downey Harvey was issued by said Court upon said petition, and

that said order to show cause was thereafter duly served upon said J. Downey Harvey and, in response thereto, he appeared and pleaded to said petition, and, after due proceedings had, he was, by an order and judgment of said Court duly given and made, duly and regularly adjudicated bankrupt, and the matter of his bankruptcy [46] duly referred to Hon. A. B. Kreft, a duly and regularly appointed, qualified and acting Referee in Bankruptcy of the above-entitled court, for further proceedings. That thereafter a meeting of the creditors of said J. Downey Harvey was called upon due and proper notice thereof, duly and regularly given, and that said meeting of creditors was regularly continued by the consent of all parties appearing thereat, until the 17th day of November, 1911, at the hour of 2 o'clock P. M. on that day, and that thereupon B. S. Stowe was duly and regularly elected Trustee in Bankruptcy of the Estate of J. Downey Harvey, a bankrupt, and his bond as trustee fixed in the sum of Five Thousand Dollars, and that thereupon said B. S. Stowe duly gave bond as required and took his oath of office, and that said Hon. A. B. Kreft did, on the 20th day of November, 1911, duly make his order approving said bond, and that ever since said time said B. S. Stowe has been and is now, the duly elected, qualified and acting trustee in bankruptcy of the estate of J. Downey Harvey, a bankrupt.

II.

That on the 26th day of November, 1909, J. Downey Harvey was the owner of five hundred and

forty-six (546) shares of the capital stock of the Shore Line Investment Company, a corporation, duly incorporated under and by virtue of the laws of the State of California, and that since said date dividends have been regularly paid and collected upon said stock in the sum of Eleven Thousand, Four Hundred and Eighty-six (\$11,486.00) Dollars.

III.

That on said 26th day of November, 1909, said J. Downey Harvey gave to S. G. Harvey the above-described property and [47] all of it and transferred to her all of said property. That said transfer was made wholly without consideration of any kind or character and that said S. G. Harvey did not confer or agree to confer any benefit whatever upon said J. Downey Harvey for the transfer of said property, or any of it to her, nor did any other person, for or on behalf of said S. G. Harvey confer or agree to confer any benefit whatever upon said J. Downey Harvey therefor. That said S. G. Harvey did not suffer any prejudice nor agree to suffer any prejudice, nor did any person whatsoever for her or on her behalf, suffer or agree to suffer any prejudice, for the transfer of said property or any part of it to said S. G. Harvey, but that said transfer was made by J. Downey Harvey to S. G. Harvey wholly without consideration of any kind, nature or form, and was purely voluntary, to wit, that of love and affection.

IV.

That J. Downey Harvey was, on the 26th day of November, 1909, wholly insolvent, and was unable

to pay his debts from his own means as they became due and that all his assets, taken at a fair valuation and all his property, taken at a fair valuation was insufficient in amount to pay his just debts and liabilities. That said J. Downey Harvey was insolvent, as above set out, and that he ever since has been and now is insolvent. That S. G. Harvey knew, on the 26th day of November, 1909, and at the time of the transfer hereinabove described, well knew that said J. Downey Harvey was insolvent and that said S. G. Harvey had at said times, knowledge of the financial condition of said J. Downey Harvey and knew that he was wholly unable to pay his debts, from his own means, as they became due and that the aggregate of his assets, taken at a fair valuation, were insufficient in amount to pay his just debts and liabilities. [48]

V.

That the transfer hereinabove mentioned was made by J. Downey Harvey to S. G. Harvey by delivering to her certain certificates of the capital stock of said Shore Line Investment Company made out in the name of said J. Downey Harvey and certifying that he was the owner of 546 shares of the capital stock of said company. That when said certificates were delivered they were endorsed by said J. Downey Harvey so as to enable them to be transferred on the books of said company and that they thereupon presented to the proper officers of said company and that certificates, so delivered, were cancelled and a new certificate was thereupon issued by said company to said S. G. Harvey, certifying

that she was the owner of said 546 shares of the capital stock of the Shore Line Investment Company.

VI.

That at the time of the transfer hereinabove mentioned said J. Downey Harvey was largely indebted in the sum of upwards of Two Hundred Thousand (\$200,000.00) Dollars to divers unsecured creditors who at said time were, ever since have been and now are, creditors of said J. Downey Harvey holding just and valid claims and debts against him and that said indebtedness, and no part thereof has ever been paid by said J. Downey Harvey, or any person whomsoever in his behalf, but that it, and the whole thereof, is and at all the times herein mentioned was, wholly due, owing and unpaid.

VII.

That all the creditors above named are represented by plaintiff in his capacity as trustee of the estate of J. Downey Harvey, a bankrupt, and that plaintiff is now, and was, ever since the 20th day of November, 1911, the trustee for all of [49] said creditors. That all the assets and property of said J. Downey Harvey and of his estate in bankruptcy are insufficient to pay the creditors thereof, holding just and valid debts, the amount of their claims, and that said creditors, and all of them, and this plaintiff are greatly damaged by the aforesaid transfer and are unjustly deprived of the value of the property so transferred.

VIII.

That said transfer, made as aforesaid, by J.

Downey Harvey to S. G. Harvey was made by him with the intent to delay and defraud the said creditors of said J. Downey Harvey of their demands, and that said transfer was accepted and taken by said S. G. Harvey with the intent and purpose to delay and defraud said creditors of their demands. That said transfer is fraudulent and void as to this plaintiff.

IX.

That dividends on said stock prior to the 26th day of November, 1909, have been declared and said dividends amount in the aggregate to Eleven Thousand Four Hundred and Eighty-six (\$11,486.00) Dollars, and said dividends having been paid to the defendant, S. G. Harvey, the plaintiff in this action is entitled to have and recover the same, and that the said dividends arose from said shares of stock and belong to this plaintiff.

X.

That the plaintiff is entitled to have, receive and recover all dividends declared upon said shares of stock, or received by said defendant, S. G. Harvey, subsequent to the commencement of this action, to wit: January 11, 1912.

XI.

That the value of the five hundred and forty-six (546) shares of the capital stock of the Shore Line Investment Company, [50] mentioned in said complaint and the answer thereto, is of the value of at least Fifty Thousand (\$50,000.00) Dollars.

XII.

That in the year 1905 said J. Downey Harvey was

solvent and was able to pay his debts from his own means as they became due, and that all his assets taken at a fair valuation and all his property taken at a fair valuation was, during that year, sufficient in amount to pay his just debts and liabilities.

XIII.

That the said J. Downey Harvey did not on or about the 26th day of June, 1905, endorse a certificate for three hundred (300) shares of the capital stock of the Shore Line Investment Company, by writing his name upon the back thereof, or otherwise, to the defendant, S. G. Harvey, nor did he give or deliver said certificate, or the shares represented thereby, to said S. G. Harvey; and that said J. Downey Harvey did not on the 29th day of August, 1905, or thereabouts, endorse to the said S. G. Harvey a certificate of stock for sixty-six (66) shares of the capital stock of the Shore Line Investment Company, and did not give or deliver said certificate, or the shares represented thereby to said S. G. Harvey, the defendant; and that the said J. Downey Harvey did not on or about the 25th day of September, 1905, endorse a certificate, or certificates, for one hundred and eighty (180) shares of the capital stock of the Shore Line Investment Company, or give or deliver said certificates to said S. G. Harvey or the shares represented thereby.

XIV.

That the transfers of said shares of stock of the Shore Line Investment Company were made by said J. Downey Harvey with the intent and purpose to delay and defraud the creditors of the said J. Dow-

ney Harvey, and such transfers were taken and accepted by [51] the defendant, S. G. Harvey, with the intent and purpose to delay and defraud the creditors of said J. Downey Harvey of their demands.

XV.

That the material allegations of plaintiff's complaint are true.

As Conclusions of Law from the foregoing, IT IS ORDERED:

I.

That the plaintiff is entitled to a decree annulling and cancelling the transfers by said J. Downey Harvey to S. G. Harvey, the defendant, for five hundred and forty-six (546) shares of the capital stock of the Shore Line Investment Company, referred to in the complaint, and to have said transfers adjudged to be null and void, and that plaintiff is the owner of all of said shares and certificate of stock, together with all dividends since the commencement of this action, to wit: January 11, 1912, and all dividends received by the defendant, S. G. Harvey, prior to the commencement of said action amounting to the sum of Eleven Thousand, Four Hundred and Eighty-six (\$11,486.00) Dollars; and enjoining and restraining the defendants, and all of them, from making any conveyance of said certificate, or the shares of stock represented thereby, and from collecting any dividends thereon, or from making any transfer of said shares, or any of them, and adjudicating the claims of the defendants, and each of them, to said property to be subject to and subordi-

nate to the title of plaintiff; and that plaintiff is entitled to recover his costs herein.

Dated Sept. 17th, 1913.

E. S. FARRINGTON,

Judge.

[Endorsed]: Filed Sep. 19, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [52]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Es-
tate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN
DOE, RICHARD ROE and JANE BLACK,
Defendants.

Decree and Judgment.

This cause came on to be heard at the April term of this court and was argued by counsel, and thereupon, upon consideration thereof, IT WAS ORDERED, ADJUDGED AND DECREED, as follows, viz.:

That the defendant, S. G. Harvey, endorse, assign and deliver to the plaintiff the certificate for the shares referred to in the complaint, to wit: Certificate evidencing five hundred and forty-six (546) shares of the capital stock of the Shore Line Invest-

ment Company, free and clear of all liens, pledges and encumbrances, done, made or suffered by the defendant, S. G. Harvey; and that if said certificate has been changed into other certificates of stock, then that such other certificates, evidencing five hundred and forty-six (546) shares of the capital stock of the Shore Line Investment Company, be endorsed, assigned and delivered to said plaintiff in lieu of the certificate referred to.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the said defendant, S. G. Harvey, shall endorse, assign and deliver to the plaintiff, as aforesaid, said certificate of shares of the [53] capital stock of the Shore Line Investment Company, a corporation, within twenty (20) days from the time of the entry of judgment herein; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that in the meantime the defendant, S. G. Harvey, be restrained and enjoined from making any transfer, assignment or conveyance of said certificate of shares, or any of them, or from collecting any dividends thereon; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that plaintiff have and recover judgment against the defendant, S. G. Harvey, in the sum of Eleven Thousand, Four Hundred and Eighty-six (\$11,486.00) Dollars, with interest thereon at the rate of seven (7%) per cent per annum from January 11, 1912; and do further have and recover from said defendant, S. G. Harvey, the amount, and amounts, of all dividends received by

her from said certificate of stock subsequent to the commencement of this action. (And for the purpose of ascertaining the amount of such dividends the plaintiff may be entitled to take any necessary supplementary proceedings in this action and to obtain any necessary supplemental decrees.)

The personal property affected by this decree is particularly described as follows:

Five hundred and forty-six (546) shares of the capital stock of the Shore Line Investment Company, a corporation, bearing date November 26, 1909, standing in the name of S. G. Harvey, and all dividends declared thereon, as aforesaid.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the plaintiff is entitled to have and recover his costs of suit against the defendant, S. G. Harvey, taxed at \$ ——.

Dated Sept. 17th, 1913.

E. S. FARRINGTON,

Judge. [54]

[Endorsed]: Filed Sep. 19, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [55]

*In the District Court of the United States, in and
for the Northern District of California, Division
Number One.*

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Es-
tate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN
DOE, RICHARD ROE and JANE BLACK,
Defendants.

**Petition for Order Allowing Appeal and Order
Allowing Appeal.**

To the Honorable Court, Above Entitled:

The above-named defendant, S. G. Harvey, con-
sidering herself aggrieved by the decree made and
entered in the above-entitled court on the 17th day
of September, 1913, in the above-entitled cause,
hereby appeals therefrom to the United States Cir-
cuit Court of Appeals for the Ninth Judicial Cir-
cuit for the reasons and upon the grounds specified
in her assignment of errors filed herewith, and prays
that this appeal may be allowed, and that a tran-
script of the record, proceedings and papers upon
which said decree was made and entered as afore-
said, duly authenticated, may be sent to the United
States Circuit Court of Appeals for the Ninth Ju-
dicial Circuit, sitting at San Francisco; and desir-
ing to supersede the execution of the decree, peti-

tioner hereby tenders bond, in such amount, as the Court may require for such purpose, and prays that her appeal be allowed, that a citation issue as provided by law, and that with the allowance of the appeal, a *supersedeas* be issued. [56]

And your petitioner further prays that the proper order, touching the security to be required of her to perfect her appeal, be made.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Solicitors for S. G. Harvey, Defendant.

ORDER ALLOWING APPEAL.

The foregoing petition for appeal is hereby granted, and the appeal is allowed, and shall operate as a *supersedeas*, upon the petitioner filing a bond in the sum of Fifteen Thousand (15,000) Dollars, with sufficient sureties, to be conditioned as required by law, and upon also depositing with the clerk of the Court the certificates of stock referred to in the judgment.

Dated, this 21st day of November, 1913.

WM. C. VAN FLEET,

Judge.

Receipt of a copy of the within Petition this 21st day of Nov., 1913, is hereby admitted.

SCHLESINGER & SHAW,
ED. H. WILLIAMS,

Attorneys for Plff.

[Endorsed]: Filed Nov. 21, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [57]

*In the District Court of the United States, in and for
the Northern District of California, Division
Number One.*

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate
of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN
DOE, RICHARD ROE, and JANE BLACK,
Defendants.

Assignment of Errors on Appeal.

Now, on this 21st day of November, A. D. 1913, comes the defendant S. G. Harvey, by her solicitor, Charles S. Wheeler, Esq., and avers that the decree entered in *to* the above-entitled cause on the 17th day of November, A. D. 1913, is erroneous and unjust to the defendant, and files with her petition for an appeal from the said decree, the following assignment of errors, and specifies that the said decree is erroneous in each and every of the following particulars, viz.:

1. That the Court erred in admitting in evidence, over the objection of defendant, S. G. Harvey, evidence that J. Downey Harvey was a director of the corporation, Shore Line Investment Company, upon the ground that said evidence was immaterial, and irrelevant, and not responsive to the issues between the plaintiff and this defendant.

2. That the Court erred in admitting in evidence,

over the objection of defendant, S. G. Harvey, evidence that J. Downey Harvey was President of the Corporation, Shore Line Investment Company, upon the ground that said evidence was immaterial [58] and irrelevant, and not responsive to the issues between the plaintiff and this defendant.

3. That the Court erred in admitting in evidence and in permitting to be read in evidence, over the objection of the defendant S. G. Harvey, the minute-book of a meeting of the stockholders of the Shore Line Investment Company, wherein it appeared that J. Downey Harvey was present at a meeting held on the 3d day of January, 1906, representing 546 shares of stock of the corporation; that an election of directors was held in which all of the stock present voted, and that J. Downey Harvey was elected a director of the corporation for the ensuing year, upon the ground that said evidence was immaterial and irrelevant and not responsive to the issues between the plaintiff and this defendant.

4. That the Court erred in admitting in evidence and in permitting to be read in evidence, over the objection of the defendant S. G. Harvey, the minute-book of an adjourned meeting of the Board of Directors of the Shore Line Investment Company held on April 25, 1907, wherein it appeared that the by-laws of the corporation were amended by written consent of certain stockholders and among the names signed to such written consent, was the name of J. Downey Harvey, holding 546 shares, upon the ground that said evidence was immaterial and irrelevant and not

responsive to the issues between the plaintiff and this defendant.

5. That the Court erred in admitting in evidence and in permitting to be read in evidence, over the objection of the defendant S. G. Harvey, the minute-book as to the minutes of a stockholders' meeting held January 2d, 1907, wherein it appeared that the meeting was called to order by J. Downey Harvey, president of the corporation; that J. Downey Harvey [59] was elected chairman of the meeting; that upon a roll-call of the stockholders present, one was J. Downey Harvey, representing 480 shares of stock standing in his name, and that he was elected one of the directors of the corporation for the ensuing year, upon the ground that said evidence was immaterial and irrelevant and not responsive to the issues between the plaintiff and this defendant.

6. That the Court erred in admitting in evidence and in permitting to be read in evidence, over the objection of the defendant S. G. Harvey, the minute-book of the Shore Line Investment Company, as to the minutes of a Board of Directors meeting of said Company held December 27th, 1906, from which it appeared that J. Downey Harvey was present as a director of the corporation; that at such meeting a resolution was adopted that the articles of incorporation be amended by and with the written assent of stockholders representing two-thirds of the subscribed capital stock of said corporation; that said amendment to the articles of incorporation was assented to upon the minute-book of the corporation by certain stockholders, among whom was J. Downey

Harvey, holding 546 shares of stock, upon the ground that said evidence was immaterial and irrelevant and not responsive to the issues between the plaintiff and this defendant.

7. That the Court erred in admitting in evidence and in permitting to be read in evidence, over the objection of the defendant S. G. Harvey, the minute-book of the Shore Line Investment Company, as to the minutes of the meeting of March 4th, 1909, from which it appeared that the meeting was called by the authority of J. Downey Harvey, President, was called to order by him, and that he voted 546 shares of stock [60] as a stockholder, upon the ground that said evidence was immaterial and irrelevant and not responsive to any of the issues between the plaintiff and this defendant.

8. That the Court erred in admitting in evidence and in permitting to be read in evidence, over the objection of the defendant, S. G. Harvey, a portion of the by-laws of the corporation, in substance, providing for and regulating the transfer of stock, upon the ground that said evidence was immaterial and irrelevant and not responsive to the issues between the plaintiff and this defendant.

9. That the Court erred in admitting in evidence, over the objection of the defendant S. G. Harvey, evidence of a conversation between the witness in said case, Burke Corbet, and J. Downey Harvey, relating to the affairs of the Ocean Shore Railway Company, a corporation, in connection with a suit brought in the United States Circuit Court, entitled, Baldwin Locomotive Works vs. Ocean Shore Rail-

way Company, upon the ground that said evidence was irrelevant and immaterial and not responsive to the issues between the plaintiff and this defendant.

10. That the Court erred in admitting in evidence and in permitting to be read in evidence, over the objection of the defendant, S. G. Harvey, entries from the private ledger of J. Downey Harvey, appearing under the caption, "Family Gifts and Allowances," upon the ground that such evidence was immaterial, irrelevant and incompetent, self-serving and hearsay.

11. That the Court erred in admitting in evidence over the objection of the defendant S. G. Harvey, evidence as to the method in which the private ledger of J. Downey Harvey was [61] kept, upon the ground that such evidence was immaterial, irrelevant and incompetent.

12. That the Court erred in admitting in evidence over the objection of the defendant S. G. Harvey, testimony that a witness, from an examination of the private ledger of J. Downey Harvey, did not find certain entries therein, regarding the stock of Shore Line Investment Company, on the grounds that such testimony was immaterial, irrelevant and incompetent.

13. That the Court erred in admitting in evidence, and in permitting to be read in evidence, over the objection of the defendant S. G. Harvey, a carbon copy of a letter from Edwin Adams Wasserman to J. Downey Harvey, dated September 22, 1907, upon the ground that such evidence was immaterial, irrelevant and incompetent.

14. That the court erred in admitting in evidence, and in permitting to be read in evidence, over the objection of the defendant S. G. Harvey, entries in the private journal of J. Downey Harvey, upon the ground that such evidence was irrelevant, immaterial and incompetent, self-serving and hearsay.

15. That the Court erred in admitting in evidence and in permitting to be read in evidence, over the objection of the defendant S. G. Harvey, entries in the private trial balance-book of J. Downey Harvey, upon the ground that such evidence was irrelevant, immaterial, incompetent, self-serving and hearsay.

16. That the Court erred in admitting in evidence and in permitting to be read in evidence, over the objection of the defendant S. G. Harvey, entries on page 162 of the private ledger of J. Downey Harvey, on the ground that such evidence was irrelevant, immaterial and incompetent, *res inter alios* [62] *acta*, and hearsay.

17. That the Court erred in admitting in evidence, over the objection of the defendant S. G. Harvey, testimony as to the method of keeping the private trial balance-book of J. Downey Harvey, upon the ground that such evidence was irrelevant, immaterial and incompetent.

18. The Court erred in admitting in evidence, over the objection of the defendant S. G. Harvey, books of the records of admissions to the First National Bank's safe deposit vaults and to be read into the record, entries found therein, upon the ground that the same was immaterial, irrelevant and incompetent, *res inter alios acta* and hearsay, and on the

further ground that it appeared from the testimony, that the said books were inaccurately kept, and that the contents thereof was not a matter of substantive evidence and the same was not offered to impeach the testimony of a witness.

19. That the Court erred in admitting in evidence, and in permitting to be read into the record, over the objection of the defendant S. G. Harvey, testimony of the defendant S. G. Harvey given before the Referee in Bankruptcy, upon the ground that such evidence was immaterial, irrelevant and incompetent and not responsive to any of the issues in this case.

20. That the Court erred in admitting in evidence, over the objection of the defendant S. G. Harvey, a letter from S. G. Harvey to E. H. Williams, dated San Francisco, December 19, 1911, upon the ground that it *immaterial*, irrelevant and incompetent, and not responsive to any issues in this case.

21. That the Court erred in admitting in evidence, over the objection of the defendant S. G. Harvey, testimony as to the circumstances under which said letter dated December 19, 1911, [63] was delivered, upon the ground that such testimony was irrelevant, immaterial and incompetent and *res inter alios acta*.

22. That the Court erred in admitting in evidence, over the objection of the defendant S. G. Harvey, the record of the United States District Court, Northern District of California, in a case entitled, Baldwin Locomotive Works vs. Shore Line Railway Company, upon the ground that it was immaterial,

irrelevant and incompetent and as not being in rebuttal, and not being a substantive circumstance tending to impeach the testimony of any witness.

23. That the Court erred in giving and entering judgment in favor of plaintiff and against the defendant S. G. Harvey, on the ground that the complaint does not state facts sufficient to constitute a cause of action.

24. That the Court erred in giving and entering judgment in favor of plaintiff and against the defendant S. G. Harvey, upon the ground that the complaint does not support the judgment.

25. That the Court erred in finding from the evidence in favor of plaintiff and against the defendant S. G. Harvey, upon the ground that the plaintiff failed to make out a *prima facie* case.

26. That the Court erred in finding in favor of plaintiff and against the defendant S. G. Harvey, on the ground that the evidence was insufficient to support the findings of the Court.

27. That the Court erred in finding in favor of plaintiff and against the defendant S. G. Harvey, upon the ground that the Court ignored in the evidence the weight of the sworn answer of the defendant S. G. Harvey. [64]

28. That the Court erred in finding that on the 26th day of November, 1909, J. Downey Harvey was the owner of 546 shares of stock of Shore Line Investment Company, a corporation.

29. That the Court erred in finding that the date on which J. Downey Harvey gave to the defendant

S. G. Harvey, the said stock, was the 26th day of November, 1909.

30. That the Court erred in finding that the defendant S. G. Harvey, knew at the time of the transfer of the said stock that J. Downey Harvey was insolvent.

31. That the Court erred in finding that at the time of the said transfer, J. Downey Harvey was indebted in a sum upwards of \$200,000.00 to unsecured creditors.

32. That the Court erred in finding that the plaintiff and said creditors were damaged by the said transfer and were justly deprived of the value of the property so transferred.

33. That the Court erred in finding that the said transfer was made with intent to hinder, delay and defraud creditors of J. Downey Harvey, and that said transfer was accepted and taken by the defendant J. Downey Harvey with like intent.

34. That the Court erred in finding that the said transfer was fraudulent and void as to the plaintiff.

35. That the Court erred in finding that the plaintiff is entitled to the dividends received by the defendant S. G. Harvey on said stock, from the 26th day of November, 1909, and the time of the commencement of this action.

36. That the Court erred in finding that the plaintiff is entitled to recover all dividends declared upon said stock since the 11th day of January, 1912.

37. That the Court erred in finding that J. Downey Harvey did not, on or about the 26th day of June, 1905, [65] endorse a certificate for 300

shares of stock in the Shore Line Investment Company, to the defendant S. G. Harvey, and did not give and deliver the said certificate, and the shares represented by it to her at said time, and that the said J. Downey Harvey did not on the 29th day of August, 1905, and on or about the 25th day of September, 1905, endorse and deliver and give to the defendant S. G. Harvey, other certificates of stock, making in the aggregate 546 shares.

38. That the Court erred in finding that the material allegations of the plaintiff's complaint are true.

39. That the Court erred in its conclusions of law.

40. That the Court erred in giving and entering its decree and judgment in favor of plaintiff and against the defendant S. G. Harvey, on the ground that the evidence was insufficient to support the judgment.

41. That the Court erred in giving and entering its decree and judgment in favor of plaintiff and against the defendant S. G. Harvey, on the ground that there was no evidence of fraud in the transfer of the said 546 shares of stock, and that the Court presumed the fraud in such transfer.

42. That the Court erred in ordering the defendant S. G. Harvey to endorse and deliver to the plaintiff, the certificates for the said 546 shares of stock.

43. That the Court erred in ordering that the defendant S. G. Harvey be restrained and enjoined from making any transfer of said shares, or from collecting dividends thereon.

44. That the Court erred in ordering that the plaintiff have and recover judgment against the defendant S. G. Harvey in the sum of \$11,486.00 and to the amount of all further dividends received by the said defendant upon said stock. [66]

45. That the Court erred in giving and entering judgment in favor of plaintiff and against defendant S. G. Harvey, in this, that the Court based its decision and the judgment entered in accordance therewith upon entries in the private account-books of J. Downey Harvey, and his declarations and conduct, the said J. Downey Harvey having filed a disclaimer in said action and not appearing as a party in the trial thereof, and the defendant S. G. Harvey objecting and excepting to the admission of such evidence; that the Court received such evidence as primary and affirmative evidence, and not in rebuttal of any testimony offered on behalf of defendant S. G. Harvey, and that the Court based its decision, findings and judgment chiefly upon such evidence as being primary and affirmative evidence on behalf of plaintiff, as manifestly appears from the opinion of the Court filed in said cause.

46. That the Court erred in giving and entering judgment in favor of plaintiff and against the defendant S. G. Harvey, in this, that the Court held the evidence on behalf of plaintiff, showing a transfer of the corporate stock, the subject of the action, was made upon the books of the corporation, on the 26th day of November, 1909, shifted the burden of proof to the defendant S. G. Harvey to show that such transfer was made between the parties at an

earlier date, as manifestly appears from the opinion of the Court filed in said cause,—the concluding paragraph of which opinion is as follows:

“That the delivery was made in 1905, is an affirmative defense, and is a matter which was peculiarly within the knowledge of Mr. and Mrs. Harvey. It has not been proven, and the evidence, in my opinion, preponderates against her and against her contention.” [67]

47. That the Court erred in giving and entering judgment in favor of plaintiff and against the defendant S. G. Harvey, in this, that the Court presumed as a matter of law, from the evidence, that the transfer of said stock was made on the books of the corporation on the 26th day of November, 1909, that the transfer between the parties was made at the same time.

48. That the Court erred in giving and entering judgment in favor of plaintiff and against the defendant S. G. Harvey, in this, that no evidence was introduced showing any fraud in the transfer of said stock, and the Court presumed such transfer to have been fraudulent on the part of the defendant S. G. Harvey.

49. That the Court erred in giving and entering judgment in favor of the plaintiff and against the defendant S. G. Harvey in this, that the Court presumed fraud in the transfer of the said stock, when the facts shown in the evidence would have comported equally as well with the absence of fraud, on the part of the defendant S. G. Harvey.

50. That the Court erred in giving and entering

judgment in favor of plaintiff and against the defendant S. G. Harvey, in this, that the Court ignored and gave no weight to evidence introduced on behalf of the defendant S. G. Harvey of declarations against interest, by J. Downey Harvey, that he had given the said shares of stock to the defendant S. G. Harvey. That plaintiff offered no evidence to rebut such evidence on behalf of the defendant, and the Court should have taken such evidence of the defendant as true as against the plaintiff.

WHEREFORE, the defendant S. G. Harvey prays that said decree or judgment be reversed, and the District Court directed to dismiss the complaint, or that such other relief be awarded as the nature of the case demands.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Solicitors for the Defendant, S. G. Harvey. [68]

Due service and receipt of a copy of the within Assignment of Errors this 21 day of Nov. 1913, is hereby admitted.

SCHLESINGER & SHAW,
ED. H. WILLIAMS,

Attorneys for Plff.

[Endorsed]: Filed Nov. 21, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [69]

Citation on Appeal (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to B. S. Stowe,
Trustee in Bankruptcy of the Estate of J.
Downey Harvey, a Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 14th day of March, 1914, being within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the clerk's office of the District Court of the United States, for the Northern District of California in the suit numbered 15,222 in the records of the said Court wherein S. G. Harvey is defendant and appellant, and you are plaintiff and appellee, to show cause, if any there be, why the decree rendered against the said defendant and appellant S. G. Harvey, as in said order allowing appeal and in said decree mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING,
United States District Judge for the Northern District of California, this 14th day of February, 1914.

M. T. DOOLING,
United States District Judge.

Reserving all objections and exceptions, receipt of a copy admitted this 16 day of February, 1914.

BERT SCHLESINGER,

A. E. SHAW,

E. H. WILLIAMS,

Solicitors for B. S. Stowe, Trustee, Plaintiff and Appellee.

[Endorsed]: Filed Feb. 16, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [70]

In the District Court of the United States, in and for the Northern District of California, Division Number One.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE and JANE BLACK,
Defendants.

Petition for Writ of Error and Order Allowing Writ of Error.

To the Honorable Court, Above Named:

Now comes S. G. Harvey, one of the defendants in the above-entitled action, by Charles S. Wheeler, Esq., her attorney, and respectfully shows, that on the 17th day of September, A. D. 1913, the Court found a verdict against your petitioner, and in favor of B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a bankrupt, the plaintiff above

named, and upon the said verdict, a final judgment was entered on the 17th day of September, A. D. 1913, against your petitioner, S. G. Harvey, the defendant above named.

Your petitioner, feeling herself aggrieved by the said verdict and judgment entered thereon as aforesaid, herewith petitions the Court for an order allowing her to prosecute a writ of error to the Circuit Court of Appeals of the United States, for the Ninth Circuit, sitting at San Francisco, under the laws of the United States, in such cases made and provided.

[71]

WHEREFORE, the premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals, for the Ninth Circuit, sitting at San Francisco in said circuit, for the correction of errors complained of and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by the plaintiff in error, conditioned as the law directs, and upon the giving of such bond as may be required, that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

CHARLES S. WHEELER and

JOHN F. BOWIE,

Attorneys for Petitioner in Error.

ORDER GRANTING WRIT OF ERROR.

Writ of error granted upon the foregoing petition, the same to operate as a *supersedeas*, upon the petitioner filing a bond, the amount of which is fixed at Fifteen Thousand (15,000) Dollars, with sufficient

sureties to be fixed as required by law, and upon also depositing with the Clerk of the Court the certificates of stock referred to in the judgment.

Dated this 21st day of November, 1913.

WM. C. VAN FLEET,

Judge.

Receipt of a copy of the within Petition this 21 day of Nov., 1913, is hereby admitted.

SCHLESINGER & SHAW,

ED. H. WILLIAMS,

Attorneys for Plff.

[Endorsed]: Filed Nov. 21, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [72]

*In the District Court of the United States, in and for
the Northern District of California, Division
Number One.*

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate
of J. DOWNEY HARVEY, a Bankrupt,

Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN
DOE, RICHARD ROE and JANE BLACK,

Defendants.

Assignment of Errors [on Writ of Error].

Now comes S. G. Harvey, one of the defendants in the above-entitled action, and plaintiff in error, and in connection with her petition for a writ of error in this cause, assigns the following errors, which plaintiff in error avers occurred on the trial thereof, and

upon which she relies to reverse the judgment entered herein, as appears of record:

1. That the Court erred in giving and entering the judgment herein, or any judgment herein, against the plaintiff in error, in this: That the complaint of plaintiff in the above-entitled cause does not state facts sufficient to constitute a cause of action at law.

2. That the Court erred in giving and entering the judgment in the above-entitled cause, in this: That the complaint in said action is insufficient to support the judgment given and entered herein, upon the ground that the said complaint sets forth a cause of action, if any, for relief in equity, states no cause of action at law, nor upon which any judgment at law may be given and entered, and that the judgment entered [73] herein awards solely equitable relief and none other.

3. That the Court erred in giving and entering the judgment in the above-entitled cause, in this: That the Court was without jurisdiction, sitting as a Court of law, to give and enter the said judgment, and was without jurisdiction as a Court of law to grant any of the relief awarded under said judgment.

WHEREFORE, plaintiff in error prays that the judgment of said Court be reversed, and the District Court directed to dismiss the said complaint as against plaintiff in error.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Attorneys for Plaintiff in Error.

Receipt of a copy of the within Assignment of Errors this 21 day of Nov. 1913, is hereby admitted.

SCHLESINGER & SHAW,
ED. H. WILLIAMS,

Attorney for Plff.

[Endorsed]: Filed Nov. 21, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [74]

*In the District Court of the United States, in and for
the Northern District of California, Division
Number One.*

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate
of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN
DOE, RICHARD ROE and JANE BLACK,
Defendants.

Writ of Error (Copy).

United States of America,—ss.

The President of the United States to the Honorable
Judge of the District Court of the United States,
for the Northern District of California, Division
Number One, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
the said District Court before you between S. G.
Harvey, plaintiff in error, and B. S. Stowe, Trustee
in Bankruptcy of the Estate of J. Downey Harvey,

a bankrupt, defendant in error, a manifest error has happened to the damage of S. G. Harvey, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the party aforesaid, in this behalf do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, [75] so that you have the same, at the City and County of San Francisco, State of California, where said Court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct the error what of right, and according to the law and customs of the United States should be done.

WITNESS, the Honorable EDWARD D. WHITE,
Chief Justice of the United States, this 24th day of
November, A. D. 1913.

[Seal]

W. B. MALING,
Clerk of the District Court of the United States, in
and for the Northern District of California.

C. W. Calbreath,
Deputy.

Allowed this 21st day of November, A. D. 1913.

WM. C. VAN FLEET,
Judge.

Receipt of a copy of the within Writ of Error this 24th day of November, 1913, is hereby admitted.

SCHLESINGER & SHAW,
EDWIN H. WILLIAMS,

Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 25, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [76]

Citation on Writ of Error (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to B. S. Stowe,
Trustee in Bankruptcy of the Estate of J.
Downey Harvey, a Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth District, to be holden at the City and County of San Francisco, in the State of California, on the 14th day of March, 1914, being within thirty days from the date hereof, pursuant to a Writ of Error filed in the clerk's office of the District Court of the United States, in and for the Northern District of California, wherein S. G. Harvey is the plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf.

WITNESS, the Honorable M. T. DOOLING,
United States District Judge for the Northern Dis-

trict of California, this 14th day of February, A. D. 1914.

M. T. DOOLING,

United States District Judge.

Reserving all objections and exceptions, receipt of a copy admitted this 16th day of February, 1914.

BERT SCHLESINGER,

A. E. SHAW,

E. H. WILLIAMS,

Solicitors for B. S. Stowe, Trustee, Defendant in Error.

[Endorsed]: Filed Feb. 16, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [77]

In the District Court of the United States, in and for the Northern District of California, Division No. One.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE and JANE BLACK,
Defendants.

Bond on Appeal and Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, S. G. HARVEY, as Principal and GLOBE INDEMNITY COMPANY, a corporation of the State of New York, as surety, are held and firmly

bound unto B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, in the full and just sum of Thirty Thousand (\$30,000.00) Dollars, to be paid to the said B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, his attorneys, or successors, to which payment well and truly to be made, we bind ourselves, and our successors, assigns, administrators, jointly and severally by these presents.

Signed and dated this 8th day of January, A. D. 1914.

WHEREAS, lately at a regular term of the District Court of the United States, for the Northern District of California, sitting at San Francisco in said District, in a suit pending in said court between B. S. Stowe, trustee in bankruptcy of the estate of J. Downey Harvey, a bankrupt, as plaintiff, and [78] S. G. Harvey, as defendant, case Number 15,222, in the first division of said court, a final judgment or decree was rendered against said S. G. Harvey, for the endorsement, assignment and delivery of a certificate evidencing 546 shares of the capital stock of Shore Line Investment Company, a corporation (which said certificate has been by the said defendant endorsed and deposited with the clerk of the Court, in accordance with an order of the Court), and further for the sum of Eleven Thousand Four Hundred and Eighty-six (\$11,486.00) Dollars, and interest thereon, at the rate of seven (7) per cent per annum, and which said judgment further provides that plaintiff "do have and recover from said defendant, S. G. Harvey, the amount, and amounts, of all

dividends received by her from said certificate of stock subsequent to the commencement of this action (and for the purpose of ascertaining the amount of such dividends the plaintiff may be entitled to take any necessary supplemental proceedings in this action and to obtain any necessary supplemental decrees)''; and it not clearly appearing whether the cause hereinabove referred to is at law or in equity, and the said S. G. Harvey having obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court, to reverse the said decree, as well as a citation directed to the said B. S. Stowe, as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California, on the — day of —, A. D. 191—, and the said S. G. Harvey having also obtained a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the [79] Clerk of the Court, to reverse the judgment of the said District Court of the United States, for the Northern District of California, and a citation directed to the said B. S. Stowe as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, citing him to be and appear before the said United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, according to law;

NOW, THEREFORE, the condition of the above obligation is such that if the said S. G. Harvey shall prosecute her said appeal to effect, and answer all damages and costs if she fails to make her plea good, and also that if the said S. G. Harvey shall prosecute a writ of error to effect, and answer all damages and costs, if she fails to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

S. G. HARVEY,
Principal.

GLOBE INDEMNITY COMPANY,

By R. P. FABJ,

Resident Vice-president.

[Seal] Attest: JOY LICHTENSTEIN,
Resident Assistant Secretary.

The foregoing Bond on Appeal and Writ of Error is hereby approved this 10th day of January, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 10, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [80]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate
of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN
DOE, RICHARD ROE and JANE BLACK,
Defendants.

**Statement of Evidence to be Included in the
Transcript on Appeal by the Defendant, S. G.
Harvey.**

The above-entitled cause came on regularly for trial before the Court, on the 4th day of April, 1912, Schlesinger & Shaw and Edwin H. Williams, Esqs., appearing for the plaintiff, and Charles S. Wheeler, Esq., appearing for the defendant, S. G. Harvey, and thereupon the following proceedings were had:

**[Statement of Case by Mr. Schlesinger, for
Plaintiff.]**

Mr. SCHLESINGER, for the Plaintiff.—“I desire to make a brief statement of the case.

“Omitting the formal allegations of the complaint, the charge is that on the 26th day of November, 1909, J. Downey Harvey was the owner of 546 shares of the capital stock of the Shore Line Investment Company of the value of \$109,200, and that dividends in the amount of \$11,486 have been paid on that stock.

"That on November 26th, 1909, J. Downey Harvey gave to S. G. Harvey, his wife, the above-described property without consideration. [81]

"The answer does not deny that the property was transferred without a valuable consideration and avers that the consideration of the transfer was love and affection.

"Our complaint charges that at the time of the transfer J. Downey Harvey was insolvent and that S. G. Harvey knew he was insolvent at the date of the transfer. The denial in the answer is merely of a legal conclusion that he is insolvent, and there is no denial of our averment that he was unable to pay his debts from his own means as they became due, and that all his assets, taken at a fair valuation, were insufficient in amount to pay his just debts and liabilities. We then aver that at the time of the transfer J. Downey Harvey was indebted in the sum of upwards of \$200,000 to divers unsecured creditors holding just and valid claims and debts against him, and that no part of said indebtedness has ever been paid, but that the whole thereof is and was at all the times mentioned in the complaint due, owing and unpaid. That allegation is wholly undenied.

"Then comes allegation ten, that the transfer was made with intent to delay and defraud the creditors of J. Downey Harvey, and that it was taken and accepted by S. G. Harvey with the intent and purpose to delay and defraud his creditors. That said transfer is fraudulent and void.

"The main issue of the case seems to be as to the date of this transfer, the answer denying that on the

26th day of November, 1909, or at any time since the year 1905, J. Downey Harvey has been the owner of the stock in question. The answer then alleges that the stock is not worth anything over the sum of \$50,000.

"We contend that if this stock was transferred to Mrs. Harvey at all it was transferred to her on November 26th, 1909, when the insolvency of Mr. Harvey is conceded in the pleadings." [82]

Mr. WHEELER.—"I think that the issue in this case narrows itself down to very small limits. We contend upon our side and in defense that Mrs. Harvey received the stock in question by gift from her husband in the year 1905; the plaintiff contends that it was given to her on November 26th, 1909, when a transfer of the stock was made upon the books of the corporation. We contend that for four and a half years prior to that time Mrs. Harvey had owned that stock, and that it had been hers; and so far as we can see, the only issue in the case is that issue of fact, did Mrs. Harvey own the stock, as she contends, in 1905, or is it true, as plaintiff contends, that she did not acquire it until 1909."

[Testimony of Burke Corbet, for Plaintiff.]

BURKE CORBET, a witness called on behalf of plaintiff, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. SCHLESINGER.)

"I am the Secretary of Shore Line Investment Company, a corporation, and have held that office ever since the organization of that company in May

(Testimony of Burke Corbet.)

or June, 1905. I have in my possession the minute-books of the corporation; also the stock certificate book brought into existence as a result of the fire of 1906. I also have in my possession the original certificates issued to Mr. Harvey."

The following certificates produced by the witness were thereupon examined and received in evidence:

Date of issue Certificate No. 2, June 26th, 1905; name, J. Downey Harvey. Certificate No. 30; name, J. Downey Harvey. Certificate No. 38, date of issue, September 25th, 1905; name, J. Downey Harvey. Certificate No. 39, September 26th, 1905; name, J. A. Folger. Certificate No. 61, date of issue, December —, 1905. Certificate No. 70, date of issue, December —, 1906. [83]

The witness then further testified as follows: "The last certificate for 66 shares was a reissuance of the stock represented by the Folger certificate to Mr. Harvey, issued when the other certificate to Mr. Folger was canceled. The certificates which have been introduced in evidence stood in the names of the parties named in them respectively, up to the 26th day of November, 1906 (with the exception of the Folger certificate, which had been previously transferred to Mr. Harvey), at which last mentioned date, November 26th, 1906, the stock represented by Certificate No. 2 for 300 shares, Certificate No. 38 for 100 shares, Certificate No. 39 for 25 shares, and Certificate No. 70 for 66 shares, was transferred into the name of Sophie G. Harvey, and Certificate No. 83, bearing that date, was issued in her name for that

(Testimony of Burke Corbet.)

stock, amounting to 546 shares. These shares have never rested in the name of Mrs. Harvey up to that time."

The witness was thereupon asked by counsel for plaintiff whether J. Downey Harvey was during all of the above mentioned times a director of the corporation. To this question, counsel for the defendant S. G. Harvey objected as being immaterial and irrelevant. The objection was overruled by the Court, and it was thereupon stated by Mr. Wheeler: "Will it be understood that we have an exception on all rulings?" Mr. Schlesinger: "That is satisfactory." To the question the witness answered "Yes."

The witness was thereupon asked whether J. Downey Harvey was also President of the corporation. To this question there was the same objection and ruling, and the witness further testified:

"That on the 3d day of January, 1906, Mr. Harvey was elected President of the Board of Directors of the corporation, and has been its President ever since."

The witness was thereupon requested to produce and read [84] into the record the minutes of the stockholders' meeting of the Shore Line Investment Company held on January 3d, 1906. This was objected to as immaterial and irrelevant, and the objection was overruled.

The minutes of the said meeting were thereupon read into the record and from the minutes it appeared that J. Downey Harvey was present at said meeting, representing 546 shares of stock of the corporation;

(Testimony of Burke Corbet.)

that the election of directors was held, at which all of the stock present voted, and that J. Downey Harvey was elected a director of the corporation for the ensuing year.

The witness was thereupon requested to produce and read into the record the minutes of a regularly adjourned meeting of the Board of Directors of the Shore Line Investment Company, held on April 25th, 1907. This was objected to as immaterial and irrelevant, and the objection was overruled.

The minutes of the said meeting were thereupon read into the record and from the minutes it appeared that J. Downey Harvey was present at said meeting. The minutes of said meeting show that the secretary announced that more than two-thirds of the stockholders had signed written consent to changing the by-laws, which written consent had been filed with the secretary of the corporation, amending Article 14 of the by-laws. Said amendment was in the words and figures following:

We, the undersigned, stockholders of the Shore Line Investment Company, have and do hereby give our written assent that the by-laws of said corporation be amended so that Article 14 thereof shall read as follows, to wit:

ARTICLE XIV.

CHECKS.

Checks of the corporation on the Treasurer, or on any bank where it may have funds deposited, may be signed and will be [85] valid if signed by two individuals of the following officers, to wit: Presi-

(Testimony of Burke Corbet.)

dent, Vice-President, Treasurer, Secretary, Assistant Secretary, or members of the Board of Directors, that is to say: provided, that one individual holding more than one office shall have power hereunto to sign such checks only as to the office, and never in a dual capacity.

Names of Stockholders.	No. of Shares.
J. Downey Harvey.	546.

Said minutes were offered and admitted in evidence.

The witness was then requested to read into the record the minutes of a stockholders' meeting held January 2d, 1907, to which the defendant made the same objection, which was overruled. Said minutes were thereupon read into the record, and from them it appeared that the meeting was called to order by J. Downey Harvey, President of the corporation; that J. Downey Harvey was elected chairman of the meeting, and that upon a roll-call of the stockholders present, one was J. Downey Harvey, representing 480 shares of stock standing in his name, and that said J. Downey Harvey voted said 480 shares of stock without having any proxies therefor, although he did have proxies from other stockholders representing 1692 shares of stock. It further appeared from said minutes that J. Downey Harvey was elected one of the directors of the corporation for the ensuing year, and that other corporate business was transacted at said meeting, including the ratification of all the acts, doings and business transactions of the

(Testimony of Burke Corbet.)

Board of Directors for the year ending January 2, 1907.

The witness was then requested to read into the record the minutes of an adjourned meeting of the Board of Directors of the said company, held December 27th, 1906. To this question there was the same objection and ruling. The minutes were thereupon read into the record, and it appeared that J. Downey [86] Harvey was present as a Director of the corporation, and that at said meeting a resolution was adopted that the articles of incorporation be amended by and with the written assent of the stockholders representing two-thirds of the subscribed capital stock. That said amendment provided that the number of the directors of said corporation shall be five, and that the names and residence of those appointed for the first year are as follows, to wit: (Among others, J. Downey Harvey, City and County of San Francisco, State of California.)

That on page 81 of the minute-book immediately following the record of said meeting appears the following:

We, the undersigned, being the owners and holders of the number of shares of the capital stock of the Shore Line Investment Company set opposite to each of our respective names, and representing and owning more than two-thirds of the subscribed and more than two-thirds of the issued capital stock of the Shore Line Investment Company, have and do hereby give this, our written assent, that the Articles of Incorporation of the Shore Line Investment Com-

(Testimony of Burke Corbet.)

pany shall be amended so that Article 5 thereof shall read as follows, namely:

That the number of the directors of said corporation shall be five (5) and the name and residence of those who are appointed for the first year and until their successors are elected and qualified are as follows, viz.:

Walter E. Dean, City and County of San Francisco,
State of California.

J. Downey Harvey,	Do.
Charles C. Moore,	Do.
Charles Carpy,	Do.
Chas. Webb Howard,	Do.
Charles N. Felton, Menlo Park, State of California.	

[87]

Names.	Number of Shares of Stock.
J. Downey Harvey.	546.

The witness further testified: "I am familiar with the handwriting of J. Downey Harvey, and the signature is in the latter's handwriting."

Subject to the same objection and ruling, the witness thereupon read into the record the minutes of the special meeting of the stockholders of the said company, held on May 4th, 1909, from which it appeared that the meeting was called to order by J. Downey Harvey, President; that the meeting was called by the authority of the President, and that J. Downey Harvey voted 546 shares as a stockholder. A resolution was regularly proposed to the stockholders, authorizing the Board of Directors to sell all the waterfront property belonging to said corporation.

(Testimony of Burke Corbet.)

Subject to the same objection and ruling, there was offered in evidence and read into the record, Article 11 of the By-laws of the corporation, substantially, as follows:

“Shares of the corporation may be transferred at any time by holders thereof, or by a party legally constituted, or by legal representative by endorsement on the certificate of stock, but no transfer shall be valid until the surrender of the certificate and acknowledgment of the transfer on the books of the corporation.”

The witness thereupon further testified: “I have never acted as attorney for J. Downey Harvey, nor has he ever paid me any counsel or attorneys’ fees. I have consulted with him in a friendly way on some of his matters. I knew that a case was brought in the United States Circuit Court, entitled Baldwin Locomotive Works vs. Ocean Shore Railway Company.” [88]

The witness was then asked whether he had ever discussed that case with Mr. Harvey. To any and all testimony relating to this suit defendant objected as being irrelevant and immaterial.

Mr. WHEELER.—“My opinion is we are now going into another matter, that is the question of Mr. Harvey’s solvency in 1909. Mr. Harvey’s solvency in 1909 is not an issue here; while we have denied for want of information and belief, as to whether or not he was insolvent in 1909, we make no claim, your Honor, as to that stock unless it was given to Mrs. Harvey in 1905; if Mrs. Harvey did not receive the gift of that stock in the year 1905,

(Testimony of Burke Corbet.)

then that stock belongs to Mr. Harvey's creditors; if it was given to her in 1905 it belongs to Mrs. Harvey; that is the case as we see it, and so it is entirely immaterial, and there is no need at all of going into a question of anything in 1909."

Mr. SCHLESINGER.—"It shows the motive for the transaction, one of the motives, and it will not take a long while, the introduction of that record will probably not require 10 minutes."

The COURT.—"I will let you prove it, but I do not see its relevancy to the matter at all."

The objection was overruled and the witness further testified: "The affairs of the Ocean Shore Railway Company were discussed in the Directors Meetings, prior to the bringing of that suit, and while it is possible that in conversing with Mr. Harvey, upon leaving him something was said about the affairs of the Ocean Shore Railway Company, I do not recollect any specific time that I did so. The suit was commenced at the request of the Board of Directors of the Ocean Shore Railway Company, in which meeting and in which request Mr. Harvey participated. It was thought that the Ocean Shore might be forced into a receivership by reason of its being unable to pay [89] some of its liabilities and those thoughts and discussions were expressed and discussed prior to November 26th, 1909.

"I do not know who paid for the assessment on the Harvey stock in the Shore Line Investment Company. Only one assessment was ever levied or paid on the Shore Line Investment Company's stock. At

(Testimony of Burke Corbet.)

the time this stock was transferred on November 26th, 1909, the certificates were brought to me by J. Downey Harvey. He gave the certificates to me and requested the transfer to be made."

Mr. WHEELER.—"I offered an admission a moment ago there was an assessment levied upon this stock in 1907, after it had been given to Mrs. Harvey; Mr. Harvey paid that assessment upon the stock; we claim that he did not have the certificate at the time that he paid the assessment but that subsequently he procured the certificate from Mrs. Harvey and the payment thereof was stamped on the stock."

The witness then further testified: "That duties of the President of the Shore Line Investment Company are defined in the by-laws in the form usually used by corporations. He is authorized to sign checks and deeds. He, Mr. Harvey, was an active president at all times from taking the office until the present time. Mr. Harvey had no other stock appearing upon the books of the Company, beside the 546 shares, until June 1st, 1909, on which date there was issued to him Certificate No. 80 for 10 shares. That was all the stock he had until December 22d, 1911."

Cross-examination by Mr. WHEELER.

In response to questions asked by Charles S. Wheeler, Esq., representing S. G. Harvey, the above-named witness testified as follows: [90]

"From the first to last, Mr. Harvey has owned upon the books of the corporation, 556 shares in all.

(Testimony of Burke Corbet.)

Of these, 546 are the shares in dispute in this action. The additional certificate for 10 shares went into his name on the books of the corporation on June 1st, 1909. These 10 shares still stand in his name on the books of the corporation, but as a matter of fact have been transmitted to his Trustees in Bankruptcy. On the 20th day of December, 1906, certificate No. 30 for 66 shares was surrendered and canceled, and on the same date a certificate for the same number of shares was issued in the name of J. A. Folger, being Certificate No. 61, and bearing date December 20th, 1906. This was part of the 546 shares here in controversy. Prior to that time these shares had stood in the name of J. Downey Harvey. After the transfer they remained in Mr. Folger's name until December 19th, 1907, at which time Certificate No. 61 was surrendered to me as Secretary, and a new certificate, No. 70, was issued in the name of J. Downey Harvey for the 66 shares of stock.

"The certificate issued in the name of Sophie G. Harvey was receipted for on November 26th, 1909, the signature being 'Sophie G. Harvey by J. Downey Harvey.' I told Mr. Harvey this was not satisfactory to me and wrote out a subsequent receipt which he brought me."

To the introduction of this receipt plaintiff objected as immaterial, irrelevant and incompetent, and a self-serving declaration. The objection was overruled and the receipt was read into the record dated, "San Francisco, November 26th, 1909" and signed,

(Testimony of Burke Corbet.)

"Sophie G. Harvey."

The witness then further testified: "I am a member of the Bar of the State end of this Court. All of the minutes I have read were dictated by me to my stenographer, and drawn under my supervision. I know that [91] Mr. Harvey signed the document introduced in evidence giving assent to the amendment of the by-laws of the corporation.

"Prior to the issuance of any stock in the Shore Line Investment Company to J. Downey Harvey, I had conversation with him upon that subject."

To the testimony of this conversation, plaintiff objected as immaterial, irrelevant and incompetent. The objection was overruled and the witness testified:

"Prior to the issuance of any stock whatever, in the name of Mr. J. Downey Harvey, I had a discussion with him as to how the stock that was subsequently issued in his name should be issued. He said to me at that time that he was buying the stock and was giving it to Mrs. Harvey. I suggested to him then that if this was true the stock should be issued in Mrs. Harvey's name. Mr. Harvey said that he preferred to have it issued in his own name because he wanted to be a Director of the corporation, and wanted to participate actively in the management of the corporation. I told him at that time, and at a number of other times when subsequent stock certificates were issued in his name, that I thought the stock ought to be issued in the name of Mrs. Harvey, if she was the owner of the stock, and

(Testimony of Burke Corbet.)

advised him at different times to that effect."

"At all of those times before any stock was ever issued in the name of Mr. Harvey, he stated to me that he had given the stock to Mrs. Harvey. After the stock was issued, we discussed it a number of times, and he told me he had given it to Mrs. Harvey. At the time that I drafted the document above referred to, and at the several times when Mr. Harvey voted or acted in the corporation as a stockholder, I knew the matters I have just testified to. The reason that I, knowing these facts permitted him to sign a document, 'we, the undersigned owners and holders of the number of shares of stock,' etc., was [92] because the stock showed on the books of the corporation in Mr. Harvey's name, and I deemed it advisable, in order to make the thing show as being a legal document, that it be signed by Mr. Harvey, and I advised Mr. Harvey at that time to sign the document."

Redirect Examination.

Upon redirect examination the witness testified: "The receipt bearing the date the 26th day of November, 1909, I think was delivered to me at the time that the stock certificate was delivered to Mr. Harvey. I did not see Mrs. Harvey in connection with the matter. The receipt is signed by Mrs. Harvey in her handwriting."

Recross-examination.

In response to further questions by Mr. Wheeler, representing the defendant S. G. Harvey, the witness testified:

(Testimony of Burke Corbet.)

"The receipt for the stock upon the stub-book, signed by Mr. Harvey for Mrs. Harvey, was before I delivered the stock certificate to Mr. Harvey. I retained that certificate of stock in my possession until Mr. Harvey brought me Mrs. Harvey's receipt."

[Testimony of Edwin Adams Wasserman, for Plaintiff.]

EDWIN ADAMS WASSERMAN, a witness called on behalf of plaintiff, after being duly sworn, testified as follows:

"I am the same person who testified before the Referee in Bankruptcy in the J. Downey Harvey matter. I know Mr. Harvey very well. I was his secretary for about 10 years and kept his books during most of that time. I entered Mr. Harvey's office, not directly in his employ, in 1896, and left in 1907."

(Referring to a book handed him, the witness testified:) [93]

"This is the private ledger of J. Downey Harvey. He only had one. On page 44 appears an account of shares of stock in the Shore Line Investment Company. I opened that account and made the entries therein up to January 1st, 1907. The following entry, April 13, 1907, is also in my handwriting. 'To cash assessment No. 1, 546 shares at \$10, \$5460.' "

The witness was thereupon requested to read all entries appearing under the caption "Family Gifts and Allowances." This was objected to by the coun-

(Testimony of Edwin Adams Wasserman.)

sel for defendant, S. G. Harvey, as immaterial, irrelevant and incompetent, self-serving and hearsay. The objection was overruled, and witness read: "Shore Line Investment Company. This stock was purchased for Mrs. Harvey and belongs to her."

The witness then further testified: "I do not know in whose handwriting are the words, 'This stock was purchased for Mrs. Harvey and belongs to her.' All of the entries are in my handwriting, up to and including April 3d, 1907. These entries are as follows:

1905.

June 20	To cash	\$7,500.00
Aug. 22	To cash Feltin interest B. Corbet	1,000.00
Aug. 24	To cash Feltin interest A. D. Bowen.....	650.00
Sep. 22	To cash 170 shares at 50	8,500.00
Sep. 26	To cash 10 shares at \$50.....	500.00

Total..... \$18,150.00

"Then for bookkeeping purposes a balance was carried forward and brought down under date January 1, 1907, 'To balance \$18,150. April 13, 1907, to cash assessment No. 1, 546 shares at 10, \$5460.' "

These entries were thereupon offered and admitted in evidence.

The witness then further testified: "At page 162 is a caption, 'Family Gifts and Allowances,' I do not know in whose handwriting is the entry 'March 31, [94] 1910, S. L. I. Co. Stock 23610.' The cap-

(Testimony of Edwin Adams Wasserman.)
tion is in my handwriting."

Mr. WHEELER.—"I understand to all this I have the same objection."

The COURT.—"Yes."

The witness then read the following:

"1907.

January	11	To cash Mrs. H.....	\$200.00
January	28	To cash Mrs. Harvey... ..	300.00
February	21	To cash Mrs. Harvey, O. S.	
		Assessment No. 3.....	500.00

"The letters O. S. Assessment No. 3, mean the Ocean Shore Railway Company Assessment No. 3.

"I kept this book up to February 21, 1907. Up to April 18, 1906, it was in our office in the Columbian Building; after that it was removed to Mr. Harvey's residence and at different times in the evening when I could not find time during the day I took it to my own home.

"I received no directions from Mr. Harvey at the time I opened the account in regard to the Shore Line Investment stock. I kept the book always at Mr. Harvey's Office, excepting that very occasionally I took it home."

To a question whether it was his practice to enter gifts to Mrs. Harvey under "Family Gifts and Allowances," counsel for the defendant S. G. Harvey objected as immaterial, irrelevant and incompetent and the objection was overruled and the witness answered, "It was."

Subject to the same objection the witness testified:

(Testimony of Edwin Adams Wasserman.)

Mr. SCHLESINGER.—Q. “Will you please read the entry appearing under date of March 31, 1910?

A. “Family Gifts and Allowances, Mrs. H. 20 shares pfd.—I presume that is preferred—May 14, 1907, \$1,000.”

Q. “What is the total drawn there?

A. “And under the same date, ‘mortgage notes payable, [95] page 58, \$3,000, total \$4,000.’ ”

The witness then further testified, subject to the same objection, as follows:

“On page 3 of the ledger under the caption:
‘Pacific lot north line of Pacific Avenue, 137 6 west
of Devisadero Street, 43 6 by 137 6.
1905.

January 10. To cash Shainwald,	
Buckbee & Co. 10%.....	\$1531.25
February 16. To cash F. J. Baker,	
surveyor... ..	1500.00
February 27. To cash Shainwald,	
Buckbee & Co... ..	13781.25

Total..... \$15327.50’

“On the other side of the page there is an entry, under date of December 31st, 1905, ‘by personal expense, gift to Mrs. Harvey, \$15,327.50,’ which balances the account.”

Subject to the same objection and ruling, the witness further testified:

“I do not find any such entry in my handwriting in regard to the Shore Line Investment Company stock. There is an entry, but not in my handwrit-

(Testimony of Edwin Adams Wasserman.)

ing. On page 44 of the ledger under an entry dated March 31st, 1910, the initials F. G. & A. presumably indicate Family Gifts and Allowances. I do not know if that entry was made when it bears date."

The witness then identified as having been written by him at that time, a carbon copy of a letter dated September 22, 1907, written by the witness to J. Downey Harvey. To the introduction of this letter in evidence counsel for the defendant S. G. Harvey objected on the ground that it was immaterial, irrelevant and incompetent. The objection was overruled and said letter was offered and admitted in evidence.

"2229 Union Street,
San Francisco, Sept. 22nd, 1907.

Dear Mr. Harvey:—

In order to give you the statement YOU DESIRE with regards your affairs have gone thoroughly over your accounts this Saturday [96] evening and to-day (Sunday) and beg to render you the following:

Your liabilities and interest charges monthly are as follows:

(Testimony of Edwin Adams Wasserman.)

Liabilities.		Interest Charges.
First National Bank.....	\$200,964.37	\$ 951.70
Of this amount \$52,000 and interest amounting to \$4000 more will be paid by Pac.		
L. & Power Co.....		
First National Bank, Murphy		
Note	45,000.00	232.50
Hibernia Savings & Loan Soc.		
Columbian Bldg.....	29,600	\$158.71
Do.	114,000	477.92
East & Merch.....	100,000	416.67
Mission Plaza	60,000	250.00
	———— 303,600.	———— 1,303.30
Mercantile Trust Co.....	60,000	
Claus Spreckels	57,800	
Mutual Savings Bank.....	17,000	
Phelan	20,000	
Carpy	20,580	
Butler	21,000	
Interest rebated on taking up of mortgage.		

Total liabilities.....\$745,944.37 Total Mo. Int..\$3,320.29

To offset the above monthly interest charges as above amounting to \$3,320.29 you have an AVERAGE MONTHLY INCOME as follows:

Eastern Oregon Land Co. dividend..... \$98.25

(There will be an additional dividend of 30% resulting from sale of timber land in the next sixty days which will practically take care of Butler note of \$7000, interest on which was paid other day.)

Stearns *Raches* Company..... 278.40

Columbian Building..... 1200.00

(Testimony of Edwin Adams Wasserman.)

East & Merchant Streets—

Pockwitz..... \$552.

Teitjen..... 90.

642.00

Mission Plaza (Woodwise)..... 220.00

Bliss Tract..... 50.00

(This will be increased to at least \$100 after
December first this year.)

First National Bank Dividends—Figured
they will average six per cent on value
of 946 shares at \$210, or \$198,660..... 1000.00

Pacific Light & Power Co. Interest on bal-
ance due for sale of Warner Ranch,
viz.: \$52,000, will average..... 217.34

(This interest will be applied to reduce
debt to First National Bank but as you
are paying interest monthly the in-
terest on contract will be applied to re-
duction of your principal at the bank
and consequently should be classed as a
monthly income to offset the interest
charge included above.) [97]

Ocean Shore Railway Bonds.....\$ 300.00

(Assmt. No. 3, \$53,000 purchased bonds at
91. This does not include No. 4105 ad-
vanced Roberg's stock bonds which I
suppose go as collateral with note and in-
terest payable to you.)

Phillipine Tel. Bonds..... 30.00

Phillipine Tel. Stock..... 20.00

(Testimony of Edwin Adams Wasserman.)

Miscellaneous.

Income from Cucamonga Stock (Vineyard)

$\frac{1}{3}$ in Polk Street lot, San Jacinto Neuvo
Land, University Club note, etc., will

average..... 75.00

Total average monthly income.....\$3,950.95

This amount does not come in monthly, however; the bank stock dividends are payable in January and December, and the other dividends are scattered irregularly throughout the year, but will average this monthly. Your interest charges amount to \$3,320.29 per month, while your income averages \$3,950.95.

Your liabilities as above are \$745,944.37. Following are a list of your assets:

Columbian Building.....	\$275,000.00
East & Merchant Streets.....	180,000.00
Mission Plaza.....	75,000.00
Butler Lot.....	25,000.00
Eastern P. Land Co. Stock 1.20.....	22,000.00
Stearns Ranchos at 60.....	16,870.00
Bank Stock 946 sh. at 210.....	198,660.00
Bliss Tract Lots.....	20,000.00
Altadena Land.....	8,000.00
Lincoln Ave. Water Co.....	998.00
Huntington Redondo.....	50,000.00
Frederick St. Lot.....	800.00
Cucamonga L. & I. Co.....	3,500.00
Do Vineyard Co.....	8,700.00
Cucamongo property 7/15ths.....	806.66
New Amsterdam Casualty Co.....	2,500.00

(Testimony of Edwin Adams Wasserman.)

Visitacion Valley Land.....	1,000.00
Burlingame Land.....	5,000.00
University Club Lot.....	500.00
Pacific L. & P. Co.....	52,000.00
San Jacinto Neuvo Ro.....	8,500.00
Burlingame Land Co.....	5,000.00
Philippine Tel. & Tel. Co. Stocks and Bonds.. .. .	22,500.00
Bank of Half Moon Bay.....	2,500.00
Polk Street lot $\frac{1}{3}$	4,465.84
Santa Cruz Beach Co. \$4,000 less half given Mrs. H.....	2,000.00
Mission Block interest cash put up with Deane.....	5,000.00

Besides the above, you should take into consideration the following:

Due from Rogers for three assessments paid Ocean Shore Stock secured by stock and bonds.....	13,420.00
Ocean Shore Rwy. Co.—Cash put in not including assessment No. 3.....	283,613.17
Ocean Shore bonds given in payment As- sessment No. 3.....	55,000.00
Shore Line Inv. Co.....	23,610.00

[98]

Following Nevada Mining Ventures
representing cash paid in:

Forward.....	\$374,643.17
Ex. Bullfrog Banner.....	\$5,000
Midas Bullfrog	8,750

(Testimony of Edwin Adams Wasserman.)

Bullfrog Banner less 1/2 given

S. G. H. 1,500

15,250.00

\$389,893.17

Assets on previous page..\$993,394.30

“ above..... 389,893.17

\$1,383,287.47

Your liabilities are \$745,943.37, and your assets the above amount which show very well on paper, but the trouble is the assets are given at a fair valuation, but if turned into cash, if it was absolutely necessary to meet your obligation they would not bring that figure, you know.

I would advise a careful study of the above with a view of disposing of all your assets that you possibly can at a valuation a little in advance of the above if possible, and paying off the debts as fast as possible. For although the liabilities are only a trifle over half the assets the interest and income on each about balance. If the various small properties and even the bigger ones could be turned into cash and applied on the indebtedness I think everything will turn out for the best.

I forgot to mention the amount of \$2144.31, which the Ocean Shore owes you for expenses of Eastern trip when you tried to sell bonds last year.

If you wish to see me about the above to-morrow

(Testimony of Edwin Adams Wasserman.)
please telephone me.

Respectfully yours,"

The witness then continued: "I do not remember whether I handed that letter to Mr. Harvey or mailed it to him. I had no communication with him about it."

Mr. SCHLESINGER.—Q. "I will call your attention to your testimony given before the Referee on page 38: 'Q. Did you ever discuss that letter with him at any subsequent time to its writing?' and did you answer, 'I think I did.' 'Q. What was said at the time, if you remember?' 'A. I think I told Mr. Harvey that in view of his condition something should be done to reduce his liabilities, the interest charges and liabilities.' [99] 'Q. He had no suggestions to make in regard to the letter, did he?' 'A. No.' Did you give that testimony? Read it carefully."

"A. Yes, I did."

Q. "And that is your testimony to-day to the same subject?"

A. "Yes, practically the same."

The witness then further testified: "I never made any notation among the accounts which I kept in that ledger of any gift of that stock to Mrs. Harvey."

Mr. SCHLESINGER.—Q. "Was it your custom to make notations of that character when you learned the facts?"

A. "Well, I could not say yes—or no."

Q. "I will ask you whether you gave this testimony appearing upon page 40: 'Was it your custom

(Testimony of Edwin Adams Wasserman.)

to make notations of that character when you learned the facts?' 'A. It was, certainly.' And you were asked again 'It was?' and did you say 'Certainly'?

"Q. What is your answer as to that?"

A. It is pretty hard to say one thing at one time and one at another; so I presume it was my statement.

Q. "You do not impeach the integrity of this record, do you, Mr. Wasserman?"

A. "No, sir, I do not."

The witness then further testified: "I sometimes discussed with Mr. Harvey entries in his books. He usually gave me pencil memoranda before I made entries. It was by this means that I got the knowledge to make entries in the books concerning the account with the Shore Line Investment Company. Either from that source, or from the stub of the check-book. Sometimes he made an entry on the check-book, sometimes I did, when I drew the check. The purpose of this was so that proper entries could be made in his books, and I could have knowledge of his business. [100] Mr. Harvey must have had knowledge of the entries in the trial balances. I gave him a statement of his account. He never went over them with me. The only entry in the trial balance, in relation to the Shore Line Investment Company stock, to my knowledge, was carried forward to January 1st, 1907, \$18,150. It was carried that way up to the time I ceased to be his bookkeeper. I think the man who succeeded me as bookkeeper was Mr. Crosby."

(Testimony of Edwin Adams Wasserman.)

Cross-examination.

"I was in the employ of Mr. Harvey from 1895 to 1908. After 1907, I helped him, but received no compensation for it. My present occupation is that of Secretary of the Pacific Company, owners of the Pacific Building. I have been in that place since I have left the employ of Mr. Harvey and the Martin Estate, in January, 1907. I am a bookkeeper and understand thoroughly the science of bookkeeping. In making these entries I entered them according to my own knowledge of bookkeeping. Mr. Harvey did not tell me how to make each and every entry that I made. Sometimes he gave me the check-book to make entries from, sometimes memoranda. As to the entries of the Shore Line Investment Co. stock my recollection is that he gave me a lead pencil memorandum."

Mr. WHEELER.—Q. "On each of the several occasions?"

A. "Yes, I cannot say positively on each occasion, but I am sure there were memoranda given."

The witness then further gave testimony as follows: "I do not remember the contents of the pencil memorandum. The cash-book would show that. There would be an entry in the cash-book of so much money paid out for something."

There was then introduced in evidence the testimony of the witness given before the Referee in Bankruptcy. This [101] testimony was substantially as follows:

"I kept Mr. Harvey's books from December, 1906,

(Testimony of Edwin Adams Wasserman.)

until three and a half years ago. I had a conversation with Mr. Harvey in regard to his books and the status of his business affairs. I identify this letter as the one which I wrote to Mr. Harvey in regard to his accounts and know generally what it contains. I don't distinctly remember the exact occasion when I wrote it, but I undoubtedly did write that letter, because it is dated at my residence, and I recognize the subject matter of the letter as being my work. I presume I did have a conversation with Mr. Harvey prior to the time when I wrote this letter in regard to his books. I think I wrote the letter in response to a request from Mr. Harvey to render an account of the status of his affairs at that particular time. I have no recollection of what was said by Mr. Harvey to me prior to the writing of the letter. I think that I discussed the letter with Mr. Harvey subsequent to its writing, and told Mr. Harvey that in view of his condition something should be done to reduce his liabilities and interest charges; he had no suggestion to make in regard to the letter. My conversation did not touch the condition of his affairs as regards solvency, but I recommended that he reduce his liabilities. After the fire, Mr. Harvey's income properties were substantially reduced in so far as his real estate was concerned and it required about a year and a half to rehabilitate them. I took care of Mr. Harvey's property interest at that time as he was very busy with the Ocean Shore. The mortgages remained, and I naturally suggested that his idle assets be turned into ready cash to apply on this indebted-

(Testimony of Edwin Adams Wasserman.)

ness in order to reduce interest charges. It took about a year and a half to rehabilitate this property, and it was then rehabilitated; the letter was written about that time when the rehabilitation was about complete and this was a general summary of his [102] affairs made with the idea of showing exactly where he stood. I note the summary designated in this letter as a summary of assets and that I have included in there the value of the Shore Line Investment Company's stock; I think that Mr. Harvey and I had some conversation in regard to that matter, but I cannot remember it distinctly; I was very busy at the time attending to Mr. Harvey's as well as Mrs. Harvey's affairs and also entering my new business as Secretary of the Pacific Company; I cannot remember any particular distinct conversation, but I have a very good recollection of it, not a decided recollection, but a distinct one, that Mr. Harvey mentioned to me at sometime or other that this property of this Shore Line Investment Company was Mrs. Harvey's property, exactly when, I could not tell you, because I don't know, it is just a recollection; it is not distinct as to time, and I cannot tell you where it was at all, nor the place, nor anything further than that there was some such subject matter mentioned by Mr. Harvey.

"I turn to page 44 of Mr. Harvey's ledger, Shore Line Investment Company; I opened that account. The entry dated April 13, 1907, is the last in my handwriting. I have no notation among the accounts in

(Testimony of Edwin Adams Wasserman.)

that ledger of any gift of that stock to Mrs. Harvey. It certainly was my custom to make notations of that character when I learned the fact. Furthermore, in the ledger is an account of Family Gifts & Allowances, which is a statement of the gifts and allowances made by Mr. Harvey during the time I kept his books as far as I know. There is nothing appearing in that account showing any gift or allowance of this stock to Mrs. Harvey. I opened and kept both accounts. I received very little direction from Mr. Harvey when I opened the account of the Shore Line Investment Company in relation to his books; he left that entirely to me, and I simply rendered [103] statements to Mr. Harvey. It was necessary for me to know certain facts before I could enter them on the books, and when I *open* this account of the Shore Line Investment Company I knew Mr. Harvey had acquired stock in that company, the amount thereof, the book value to be placed upon it and all those facts.

I think I received knowledge of the first transaction at the time Mr. Harvey purchased the first block of Shore Line Investment Company's stock; he brought in to me a little pencil memorandum and I think he said 'put this on record.' He entered the dummy stub in the check-book showing that, and naturally I put it on his books. He gave me the pencil memorandum for one purpose, obviously so that I could, by knowledge of his business, make the entries in his books. I have no distinct recollection of what he said, but have an indistinct remembrance, to the effect that this Shore Line Investment Company

(Testimony of Edwin Adams Wasserman.)

stock was Mrs. Harvey's. It was my practice to enter gifts to Mrs. Harvey under the head of Family Gifts and Allowances. I made such an entry in regard to the Pacific Avenue lot, but not exactly at the date the gift was made. I made the entry at the close of the year but the property was purchased in January. In the letter I wrote in relation to the Santa Cruz Beach Company's stock I have specified the particular property given to Mrs. Harvey as 'less half given to Mrs. Harvey,' and made the same notation in relation to some Tonopah stock, but I find no such entry in regard to the stock of the Shore Line Investment Company. I cannot say distinctly that at the time I wrote that letter I was not aware of the fact that Mrs. Harvey had any interest in that stock; if I had known that it was Mrs. Harvey's I presume that I would have noted it in my letter just as I did in the other cases. In the cash-book under date of September 9, 1905, a pencil memorandum appears opposite the words Shore Line Investment Company, [104] 'property of S. G. H.' also on page 27 opposite Shore Line Investment Company and a like entry on page 35 and page 41; these books were accessible to me at the time I made my statement to Mr. Harvey. The pencil entries are not in my handwriting, but in the handwriting of Mr. Harvey. If those entries had been in the book at the time I made up this statement I might have seen them and I might not."

The witness then further testified upon cross-

(Testimony of Edwin Adams Wasserman.)

examination in answer to questions by Mr. Wheeler, as follows:

"I now have a clearer memory with regard to Mr. Harvey's conversation with me about the Shore Line stock."

To a question calling upon the witness to relate this conversation, counsel for plaintiff objected upon the ground that it was a self-serving declaration. The objection was overruled and the witness testified:

"At the time the assessment of the stock was paid,—I do not know the exact date, but it would show in the book,—I remember distinctly about asking Mr. Harvey about a receipt or entry for that assessment, and he told me that Mrs. Harvey—she, I think, was away at the time—that when she came back he would have the receipt entered on the stock. It was my habit when Mr. Harvey paid an assessment, to have the receipt entered on the back of the stock. Mr. Harvey told me that Mrs. Harvey had possession of the stock at this time when the assessment was paid. This date was April 13th, 1907. I made the entry on page 44 of Mr. Harvey's ledger showing the payment of this assessment.

"I remained in Mr. Harvey's employ until about the middle of 1908, and I presume I kept the books to the last. I was succeeded by Mr. Crosby. I am quite familiar with his handwriting, and the entries in the books not in my handwriting are all in his,—in the accounts I have testified to, [105] 'Family Gifts and Allowances and Shore Line Investment Company.' While I was in Mr. Harvey's employ I

(Testimony of Edwin Adams Wasserman.)

had access to his safe where he kept stocks and bonds and papers of that character. We had two safes at that time, in his office, one was a personal safe of Mr. Harvey's and the other was the safe of the Martin Estate. At all times, commencing with 1905, I had access to all compartments of Mr. Harvey's safe, except one compartment which was held by a friend of Mr. Harvey's who was in the office. All the rest of the safe was used by Mr. Harvey. I also went quite frequently to Mr. Harvey's safe deposit box."

(Objected to by the plaintiff on the ground that it is irrelevant, incompetent and immaterial and that it is not proper cross-examination. Objection overruled.)

"I went there a great many times for the purpose of checking up the assets in that box. This box was in the First National Bank at Bush and Sansome Streets. During each year at least, that I was in Mr. Harvey's employ, I went to this box and checked up the securities. At the time of the San Francisco Fire I went up to the office in the Columbian Building, opened the safe and gathered up all our securities and papers that I thought were valuable. I took them down to an automobile which I had at that time, and out to Mr. Harvey's house. One block of papers I carried around for some time in a wallet, on my person, as I did not know whether Mr. Harvey's house would burn or not. This was the wallet within which Mr. Harvey had his securities, insurance policies and other valuable papers."

(Objected to by plaintiff irrelevant, incompetent

(Testimony of Edwin Adams Wasserman.)
and immaterial. Objection overruled.)

"I never saw any stock of the Shore Line Investment Company in Mr. Harvey's custody, either in his office safe, or in his [106] safe deposit box, or at the time that I took his securities to his house. At no time between the year 1905, and the time that I left Mr. Harvey's employ in 1908, did I see any certificates of stock of the Shore Line Investment Co. in the custody or control of Mr. Harvey."

There was then shown to the witness the cash-book of J. Downey Harvey and his attention was called to an item under date September 23, 1905, "Shore Line Investment Co.," after which there appeared in pencil the words, "property of S. G. Harvey." The witness testified that the words "property of S. G. Harvey" were in Mr. Harvey's handwriting, and then further testified:

"Mr. Harvey did not frequently go over his books. This entry is an item which I would go over in making up my monthly statements of trial balances. I have no idea when the particular entry was made. I do not know whether it was made before I left Mr. Harvey's employ or not. I never saw it. I never looked back over that account because when the cash is written up that is the end of it; the trial balances are made from the ledger not from the cash-book."

Redirect Examination.

"I testified that at some indefinite period of time I had examined the papers in Mr. J. Downey Harvey's safe and also the papers in his safe deposit box, and shortly after the fire I carried around for a

(Testimony of Edwin Adams Wasserman.)

week in a red wallet the valuable papers of Mr. Harvey. I did not make these entries because of the examination of the various papers of Mr. Harvey, which I made at that time. It was not because of those facts that in my letter of September 22, 1907, I included the stock of the Shore Line Investment Company as one of Mr. Harvey's assets." [107]

[Testimony of James W. Crosby, for Plaintiff.]

JAMES W. CROSBY, a witness called on behalf of plaintiff, after being duly sworn, testified as follows:

Direct Examination.

"I was the bookkeeper for J. Downey Harvey from the spring of 1908, until practically the present time. I made an entry in the journal under the head of 'Family Gifts and Allowances,' as follows: 'To Shore Line Investment Company, \$23610.00 transfer to Mrs. S. G. H. of S. L. I. Stock. J. D. H. states this stock was originally purchased for Mrs. H.'"

Mr. WHEELER.—"I take it that this line is being excepted to. Mr. Harvey's declarations subsequent to the time of the alleged gift are not evidence against his wife."

Mr. SCHLESINGER.—"That is all right."

The COURT.—"I understand that if there are any new grounds you may suggest them as you go along."

The witness then continued: "The entry is made under date of March 31, 1910. I could not say that it was made on that day, but I should say within a

(Testimony of James W. Crosby.)

year of that date, either preceding or subsequent to it. I made this entire entry at my own volition and not at the request of any person, but in accordance with the facts of which I was cognizant. It was about the time that Mr. Harvey's bankruptcy proceedings were pending, and he asked me to make up a statement for him during the time I kept his books; that is about the only time he ever asked me to make up a statement, and I wanted his books to show the exact condition of his affairs. I do not know that I have ever discussed this particular entry with Mr. Harvey. Some time prior to that date he asked me to make a note in the ledger at the head of that account, that this stock belonged to Mrs. Harvey. I do not recall the exact date, but I think it was several years prior to the time I made this entry. [108] I made this entry in 1910 and entered his employment some time during the year 1908. He did not ask me to make that entry. I made that entry while in his employ,—well, I was not exactly in his employ. That is, I never received any salary from him for keeping his books. I was at that time auditor and assistant secretary of the Ocean Shore Railway Company. I was also assistant secretary of the Shore Line Investment Company. Mr. Harvey was president of both these corporations and I was paid a salary by both these companies. I did not receive any instructions whatsoever with respect to this particular entry before making it. The entry was made to wipe the amount off his books in accordance with a statement or request made some time before

(Testimony of James W. Crosby.)

that I make a notation at the head of the account in the ledger covering the stock of the Shore Line Investment Company, that the stock did not belong to him. On one occasion, prior to the time I made that entry, I went over with Mr. Harvey, his assets and liabilities. I testified before the Referee in Bankruptcy, in the bankruptcy proceedings of Mr. Harvey, to the effect that I had gone over with Mr. Harvey the book accounts of all his assets. The only account that Mr. Harvey was interested in to any extent was his cash account, which was balanced from month to month. The other books I had at my home and possibly a year would elapse before I would make any entry in them. He would give me memoranda from time to time from which I would make entries, and any entries that were necessary I made in accordance to such memoranda. He instructed me, prior to March, 1910, to make an entry of this gift to Mrs. Harvey. I cannot say positively when, but at some time during 1908 or 1909 he gave me instructions to note at the head of the Shore Line Investment Company account, in the ledger, that the stock belonged to Mrs. Harvey. I cannot point out in Mr. Harvey's journal any entry of this transaction [109] which I made prior to the year 1909.

"I kept Mr. Harvey's trial balance-book. The first one which I entered was October 31, 1909 and the date of the last was August 31, 1911. I entered in this trial-balance book, referring to ledger folio 44, Shore Line Investment Company's stock under date of October 31st, 1909, on the debit side \$26,110,

(Testimony of James W. Crosby.)

and under date of March 31st, 1910, in the debit column of the same ledger folio and heading I entered \$2,500. The trial balance of October 31st, 1909, was the first that I took; the sum of \$26,110 was the balance shown in the ledger prior to the time that I made the entry transferring Mrs. Harvey's stock to the Family Gifts and Allowance account; the balance for \$2,500 was the amount appearing in the ledger representing stock which Mr. Harvey himself owned. The only balance sheet which I really discussed with Mr. Harvey was at the time I made up his books in 1911, when bankruptcy proceedings were pending. I did not go over Mr. Harvey's accounts with him, to any extent, prior to 1910. The trial-balance book I think I had at my home. Whatever work I did in it was in the evening or on Sundays. I had his ledger, journal, cash-book and trial-balance book at my home for several years. I did not go over these books with him until a comparatively short time ago. Any entries which I made in these books, except ordinary bookkeeping entries, were taken by memoranda given to me by Mr. Harvey, or from information which he gave to me verbally from which I made memoranda. I do not know that I had talked to Mr. Harvey on the subject of this stock before I made the entry appearing in the trial-balance book, ledger folio 44, debit, Shore Line Investment Company, \$26,110; I presume it was prior to that time that he directed me to make the notation at the head of the account in the ledger. Mr. Harvey never gave me any written

(Testimony of James W. Crosby.)

memoranda to make the transfer of this stock to Mrs. Harvey. He instructed me [110] verbally to make a notation at the head of the account. All my information upon the subject was obtained from Mr. Harvey. Under the caption, 'Family Gifts and Allowances,' under date of March 31st, 1910, I made the entry 'S. L. I. Co. Stock \$23,610.' The abbreviation refers to the Shore Line Investment Company. Mr. Harvey did not hand me any memorandum before I made this entry. I had no independent information with respect to the matter but obtained all my information from Mr. Harvey. It is not correct that I dated these entries on March 31st, 1910, because I got the information on that day."

Counsel for the plaintiff then offered in evidence page 162 of the ledger of J. Downey Harvey. This was objected to by counsel for the defendant S. G. Harvey upon the ground that it was *res inter alios acta*, or hearsay, immaterial, irrelevant and incompetent, which objection was overruled.

The witness then further testified: "Referring to my testimony before the Referee in Bankruptcy regarding these entries, I said that they were made at approximately the date they bear date. In Mr. Harvey's journal on page 58, under date of March 31st, 1910, I made the entry, 'Family Gifts and Allowances. To Shore Line Inv. Co. Transfer to Mrs. S. G. H. of S. L. I. Stock. J. D. H. states this stock was originally purchased for Mrs. H.' As I testified before here, I think it was within a year.

"In my examination before the Referee in Bank-

(Testimony of James W. Crosby.)

ruptcy I was asked the question 'I call your attention to the entry on page 58 of the Journal, March 31st, 1910, Family Gifts and Allowances, to Shore Line Inv. Co. transferred to Mrs. S. G. H., S. L. I. Co. Stock. J. D. H. states that this stock was originally purchased for Mrs. H.' That entry was made approximately on the day it bears date, was it not, March 31st, 1910? And I gave the answer 'I should say that it was.' My recollection on the subject is not a bit better to-day than it was when I testified [111] before the Referee. I made the entry on page 44 of Mr. Harvey's ledger, reading 'March 31st, 1910, F. G. & A. (meaning Family Gifts and Allowances) 546 shares \$23,610.' That entry was made within a comparatively short time after that date. By comparatively short time I mean within a year, although it might have been within the month, I don't recall exactly. In testifying before the Referee in regard to this entry in the ledger I was asked the following questions and gave the following answers: 'Q. Was that entry made when it bears date? A. About. Q. About the date it bears date, and it bears the same date that the journal entry bears, does it not? A. Yes, I stated. Q. Then it was made on the day it bears date? A. Yes, unquestionably.' Did you give that answer 'Yes, unquestionably'? I am not sure that I used the word 'unquestionably' I might have said approximately, but I did give the answer yes. My recollection at that time was as good as it is now."

Mr. WHEELER.—"I think we are wasting a

(Testimony of James W. Crosby.)

good deal of time over this. There is no contention upon our part that there were any entries prior to the date upon which they appear in the book; what difference does it make? We will admit that they were made upon the dates they bear, if counsel desires; it will save a lot of time in running it down; as to whether it was, is certainly immaterial to us."

The witness then further testified: "All of these entries as to which I have been testifying, although they may not have been made on March 31st, 1910, were made at approximately the same date. My work on the books sometimes ran more than six months behind. I think there was one occasion on which I had about 18 months work to do. I had [112] ten years experience in Bookkeeping before entering the employment of the Ocean Shore Railway Company."

Counsel for plaintiff thereupon offered in evidence the following items from the trial-balance book of J. Downey Harvey:

February 1906	\$18,150.00
November 1906	18,150.00
December 1906	18,150.00
February 1, 1907	18,150.00
February 29, 1908	23,610.00

all bearing opposite the words, "Shore Line Investment Company."

Counsel for the defendant S. G. Harvey thereupon renewed his objection to the introduction of this evidence, which objection was overruled by the Court.

(Testimony of James W. Crosby.)

Cross-examination.

"I made all of the several entries referred to at approximately the same time; within a few days. The entries made under date of March 31st, I think were made within a few days of that time. I was not familiar with the fact that this stock was transferred to Mrs. Harvey in 1909, and knew nothing about that. At any rate, they were made subsequent to November 26, 1909. I knew nothing about the transfer of the stock upon the books of the corporation.

"In the spring of 1908, Mr. Harvey asked me if I would look after his books; that Mr. Wasserman was too busy to do so and after that I kept them. I had them at my home in order to make the entries necessary in the evening and on Sundays. I was very busy during the day, and did not feel much like working in the evening. Consequently, I left them go for long periods without making any entries at all. Mr. Harvey was interested only in his bank balances, and his check-book was at the office, and I checked his bank balance monthly. That was practically the extent of the work I did for him beside the comparatively few entries I made in his general books." [113]

Mr. SCHLESINGER.—"I submit the books are the best evidence. I have no objection to the books going in evidence. I was going to suggest to Mr. Wheeler that it seems to me that the best proof as to how those books were kept and as to whether they were kept as bookkeeping is usually performed,

(Testimony of James W. Crosby.)

would appear from the books themselves; and I have no objection,—not that I insist upon it,—that these books may be taken and examined by his Honor.”

Mr. WHEELER.—“I have not the slightest objection to that; I am perfectly willing that his Honor should examine them if he desires.”

The witness, on cross-examination, then further testified:

“His transactions were comparatively few. There was an entry in the cash-book for every transaction performed by cash, the passing of cash or a check. There were very few entries aside from the cash-book. Mr. Harvey kept a check-book with a stub on which the transactions were entered. I used the stubs in entering up the cash. During the time the books were at my home, they were not examined by, or exhibited to, anyone except myself. I never showed them to any creditor of Mr. Harvey’s, and was never asked to show them.

“The occasion on which Mr. Harvey spoke to me about making an entry on the books that this stock belonged to Mrs. Harvey, was not the first time I heard from him that she owned the stock. I was in the employ of the Shore Line Investment Co. at the time that the assessment was paid in 1907. I had a conversation with Mr. Harvey at this time.”

To the testimony of this conversation, counsel for plaintiff objected as irrelevant, immaterial and incompetent and not proper cross-examination, and a self-serving declaration. The objection was over-

(Testimony of James W. Crosby.)

ruled by the Court, and the witness [114] continued:

"I do not remember the exact conversation, but he brought me a check in payment of the assessment. He told me at that time that it was to pay the assessment on Mrs. Harvey's stock, that Mrs. Harvey was away at the time and consequently he could not get the certificates, but he would bring them to me later to have the notation 'assessment paid' stamped or written on the back of the certificates. This was done at a later day. I do not recall how long afterwards. I do not recall Mr. Harvey's wording, but I understood that the stock belonged to Mrs. Harvey. I do not know whether he said the stock belonged to Mrs. Harvey in so many words or not. He told me the stock was Mrs. Harvey's at that time. Not I, but Mr. Wasserman was his book-keeper at this time. I was the auditor and I think the assistant secretary of the Shore Line Investment Company at that time. At any rate I kept the books."

Mr. WHEELER.—Q. "What, if anything, did you have to do with the stamping of the payment of assessments upon the stock?"

A. "I did not have anything to do with that, I think—it was customary for me to have Mr. Harvey sign the receipt of the payment of the assessments as president of the company—I received the money."

Q. "You received the money for the company?"

A. "For the company."

Q. "And did you make entry in the assessment-

(Testimony of James W. Crosby.)

book of the payment of assessments?"

A. "I think I did—yes, I know I did. I did."

Redirect Examination.

"My recollection is that the check given in payment of the assessment was Mr. Harvey's check. I presume that I gave him a receipt for it." [115]

[Testimony of Robert Finn, for Plaintiff.]

ROBERT FINN, a witness called on behalf of plaintiff, after being duly sworn testified as follows:

Direct Examination.

"I am the Superintendent of the Safe Deposit Vaults of the First National Bank, and have charge of the boxes. I have with me some records showing admissions to the safe deposit boxes of Mrs. J. Downey Harvey from June 1st, 1905, to December 31st, 1905."

Mr. WHEELER.—"I would like to know the purpose of counsel in offering this evidence. Counsel is undoubtedly entitled to this evidence in the course of the trial, but it is not coming in its regular order. If a question arises as to the veracity of Mrs. Harvey the claimant of this stock, that is evidence; anything which will throw light upon that subject your Honor is entitled to, and there will be no opposition on our part to the fullest investigation, but the proper order of proof is that this testimony should come in the form of rebuttal of the truth of Mrs. Harvey's testimony."

The COURT.—"The testimony does not seem to

(Testimony of Robert Finn.)

be in its order, but that is something that I am not insisting upon."

The witness was then requested to read all entries showing these visits.

On cross-examination by counsel for defendant S. G. Harvey, relative to the records, the witness testified:

"When a customer visits his box, either in person or by an order, it is the rule to make an entry on our books. There are five employees in the safe deposit department. One man does the unlocking of the boxes, and has the master key. Some customers write their name upon a ticket, some don't. When the name is written, the ticket is kept. When the customer does not write the name an entry is made. It is our effort to [116] make a record, as near as possible, of everybody who goes in. I do not know of any omissions in the record since we went into the new place. We have a better system there than in the other. The other system was not so correct. In 1906 we were at the old place."

Mr. WHEELER.—Q. "At the old place; so that whatever records made relate to the year 1905 or 1906, the records made at the old place where your system was not so correct—that is true, isn't it?"

A. "We tried to get them all."

Q. "But you have known of many omissions there, have you not?"

A. "I don't know; we tried to get them as near as possible."

Q. "But you have known of omissions, have you

(Testimony of Robert Finn.)

not?" A. "Yes, probably, there was."

The witness then further testified: "When a customer changes from one box to another, we now note the change upon our books and require a new signature."

Counsel for plaintiff thereupon offered in evidence the books Nos. 51, 52 and 53 of admissions to the First National Bank's safe deposit vaults.

To this evidence counsel for defendant S. G. Harvey objected upon the ground that it was immaterial, irrelevant and incompetent, and *res inter alios acta hearsay*, and upon the further ground that it appeared from the testimony of the witness that the books were inaccurately kept, and that the evidence was inadmissible as a matter of substantive evidence, and inadmissible to impeach the testimony of the witness. No objection to the evidence was offered on the ground that the original books were not produced. The objection was overruled by the Court. [117]

Mr. SCHLESINGER.—"I expect to show from these books, and the books do absolutely show that Mrs. Harvey did not visit the safe deposit vaults or gain admission to that box at any time during the month of June, 1905; I expect to show that she did not gain admission to that box at any time during the month of August; I expect to show—"

The COURT.—"Of the same year?"

Mr. SCHLESINGER.—"Of the same year, your Honor. That she did not gain admission to that box at any time during the month of September. I will

(Testimony of Robert Finn.)

furthermore show from those books, the same year, between June 1, 1905, and December 31, 1905, that Mrs. Harvey did not inspect, examine or visit her box at all. I will show that there were three admissions to that box during that time, and only three admissions, one admission on Saturday, July 15, 1905, when Lizzie Anderson, Mrs. Harvey's maid inspected the box at 4:52 P. M. and left at 4:56, on an order of Mrs. Harvey; that the next visit was on July 17, 1905, when Lizzie Anderson, Mrs. Harvey's maid, again visited the box at 5:02 P. M. on Mrs. Harvey's order; and the next visit during those six months was on November 8, 1905, when Lizzie Anderson visited the box at 4:15 P. M. and left at 4:34 P. M. on an order."

The witness then stated that the books offered in evidence contained the record of admission to the safe deposit box at the First National Bank Vaults between June 1st, 1905, and December 31st, 1905.

Mr. WHEELER.—"We make no claim that the stock was left in the safe deposit box."

The WITNESS.—"Mrs. Harvey changed her safe deposit box on July 31st, 1911; she changed it before that on May 25th, 1905."

Counsel for plaintiff then offered in evidence testimony of Mrs. S. G. Harvey given before the Referee in Bankruptcy. To [118] the admission of this evidence counsel for the defendant S. G. Harvey objected as immaterial, irrelevant and incompetent, and not responsive to any issue in the case, and upon the further ground that it was in the nature of rebuttal

testimony, if anything, and upon the further ground that Mrs. Harvey was not upon the witness-stand to be confronted with the testimony. The objection was overruled by the Court.

The testimony of Mrs. Harvey before the Referee in Bankruptcy was then read into the record, and was substantially as follows:

[Testimony of Mrs. S. G. Harvey Before Referee in Bankruptcy.]

"In 1905 Mr. Harvey told me he was going to give me some stock in the Shore Line Investment Company and he gave me in June of that year 300 shares. He told me as he acquired more he would give it to me. The reason that he kept the shares in his own name was because he was a big holder in the Ocean Shore Railway Company and that would show his interest in the Shore Line Investment Company, if he kept them in his name. In August he gave me 66 shares. In September he gave me 160 shares and 20 shares, and I put them in my box. In 1906 Mr. Harvey asked me for the certificate for 66 shares in order to make Mr. Folger a director of the Company. In 1907, Mr. Harvey wrote me, I was then in New York, there was an assessment on the Shore Line Investment Company of \$10 which he paid and when I returned in July I gave him the certificates and he had the assessments endorsed on them. In December, Mr. Folger went out of the directorship of the Shore Line Investment Co. and I got the certificate endorsed by Mr. Folger, and gave it to Mr. Harvey. He gave me another one endorsed by himself and I

(Testimony of Mrs. S. G. Harvey.)

put it in my box. Mr. Harvey gave me the stock in the respective months that I have named in 1905; I mean by that he gave me the certificates. The certificates in form were like common certificates, and they were endorsed by Mr. Harvey. [119] I put the certificates in the safe deposit of the First National Bank, where I always have a box. I remember the dates on which these certificates were given me, because I put them down on a memorandum."

Mr. SCHLESINGER.—"Mr. Wheeler, will you admit that this was a memorandum handed to Mr. Williams by Mrs. Harvey?"

Mr. WHEELER.—"I will admit that Mrs. Harvey copied off these numbers and that it was handed in the course of your proceedings in bankruptcy; that is true; but this is not the memorandum which Mrs. Harvey referred to in her testimony at all."

The further testimony of Mrs. Harvey, before the Referee in Bankruptcy was then read into the record, and was substantially as follows:

"In December, 1906, Mr. Harvey stated he wanted the stock certificate for 66 shares to make Mr. Folger a director. I went to my box and got the certificate and gave it to Mr. Harvey. I received it back again endorsed by Mr. Folger's name and put it in my box."

"The first of these certificates was given to me in June, 1905. The only discussion I had with Mr. Harvey was that as he acquired the stock he would give it to me. He actually delivered me a certificate of stock at that time and he said I was to take it and

(Testimony of Mrs. S. G. Harvey.)

put it in my box and I took it at that time and put it in my box. I am sure that the date was June, 1905.

"I understand, at the time I gave Mr. Harvey the certificate to make Mr. Folger a director, that I was placing it out of my power for a day or so. Mr. Folger remained a director until 1907, but I received the certificate back immediately and put it in my box. It was endorsed by Mr. Folger's name. The stock stood in Mr. Folger's name while he was acting as a director, but I had the endorsed certificate in my safe deposit box. [120]

"I knew that Mr. Harvey was president of the Shore Line Investment Company at all the times I have mentioned, and was taking a very active interest in the Company's affairs. Mr. Harvey had no interest in the Shore Line Investment Company outside of what I have stated.

"As a matter of fact, I delivered all those shares of stock according to Mr. Harvey's directions. There was not much direction given me, but I was at all times willing to act in accordance with his suggestion. I never repaid Mr. Harvey the amount he advanced for assessments, because he never asked me. He said it was a gift along with the others. I never had any discussion with Mr. Fay in regard to the Shore Line Investment Company. Never spoke to him about it in my life. Mr. Harvey told me Mr. Fay was to manage at Granada. He never told me anything else about him. Mr. Harvey never asked me for possession of my stock so that he could deliver it to Mr. Fay. He never asked for the posses-

(Testimony of Mrs. S. G. Harvey.)

sion of the stock at any time except for Mr. Folger, and except that in 1909 he asked me for the stock again because there was a second assessment.

"Mr. Harvey told me that since I was the owner of the stock the bank absolutely demanded that I should sign the note. He said that since I was the owner and holder of the stock he deemed it advisable to have it put in my name, and therefore he had it put in my name. Up to that time he had always appeared on the books of the corporation as a stockholder. I always knew that the stock stood in Mr. Harvey's name on the books of the corporation and was familiar with the fact that he was acting as president of the company and was managing its affairs. I was cognizant of the fact that there had been an assessment on the stock, but never made any offer to return that money to him." [121]

TESTIMONY JANUARY 5, 1912.

"I had a safe deposit box in 1905, during the entire year, in the First National Bank. That was the only safe deposit box that I had anywhere. I had the same box during the years, 1906, 1907, 1908, 1909, and 1910, and only had that single safe deposit box during any of that time. The box was in my own name. At one time Miss Ella Smith had access to it, but no one else. She has not access to my box at the present time.

"I kept in my box letters and things of that sort. Sometimes shares, sometimes not. I did not have any shares of stock of the Shore Line Investment Company in that box during the year 1905. I made

(Testimony of Mrs. S. G. Harvey.)

a mistake in my testimony that is the reason I want to correct it. I never had any shares of stock of the Shore Line Investment Company in my box at any time. I kept that stock in my own safe. I had other papers during the years from 1905 to 1910, but I don't think I had any other shares of stock in the safe deposit box. I had more my letters and jewels there. I don't think I had anything else of value. I can't answer.

"During the years 1905 to 1910 I lived at 2555 Webster Street in San Francisco and that was my only residence in the State. I have frequently traveled. I don't remember whether I left San Francisco for a long period of time during the year 1905. During 1906 I spent from April until the following July or August in Europe, in France. I had the Shore Line Investment Company shares in my possession prior to my departure for Europe. I did not take them with me. They were in my safe during my absence. My safe was at home. I have not the same safe to-day. I have changed safes and I cannot tell you the date of the exchange, but I always had a safe. I believe I changed safes in 1907 when my daughter, Mrs. Cooper, was married. I gave her my safe and bought another. While I was in Europe these [122] shares rested in my first safe. My maid had access to the safe I have now. They were both combination safes. My husband never had access to these safes. I was living with him in the same house, but nothing that belonged to him rested in that safe. His will was in my safe deposit

(Testimony of Mrs. S. G. Harvey.)

box at the First National.

"I went to Monterey during the year 1907 and took the safe with me, and lived there until the end of 1907; from September, 1907, on. Altogether I lived there nearly three years, only coming to San Francisco occasionally. Mr. Harvey visited me at Monterey occasionally. He never had access to my safe.

"All my different papers rested in my safe at Del Monte, whatever papers I had. I took some of my jewelry with me to Monterey and it also was in that safe. All my valuable papers, evidences of ownership in corporations, shares of stock and other valuables, including my jewelry were put in this safe and not in my safe deposit box in the First National Bank, except that there was a little antique match box belonging to my uncle and some antiques in my safe deposit box. The letters in my safe deposit box were of no particular value; just personal letters that I used to keep. To sum the matter up briefly, the safe deposit box which I kept and paid for during the years 1905 to 1910, inclusive, contained nothing of value aside from this antique match box and some letters of little value.

"On December 19th, after I gave my testimony under examination of Mr. Williams, I wrote him the following letter.

" 'San Francisco, December 19, 1911.

E. H. Williams, Esq.,

San Francisco, California.

Dear Sir:—

If you wish to learn from the safe deposit company

(Testimony of Mrs. S. G. Harvey.)

the dates on which I visited my safe deposit box, I have no objection whatever, and am perfectly willing that the bank officials shall give you the information, and you may tell them so for me. I do not myself know the exact dates of my visits. I have, of course, been there a number of times since 1905; but I have at all times had a safe of my own wherever I have been living, whether here or at Monterey, and I kept many of my papers in [123] these safes, and, as I think it over, I am positive I kept my certificates of stock there instead of in my safe deposit box. I also forgot for the moment and omitted to tell you when on the witness-stand, of the sale by Mr. Harvey to me of 200 shares of Philippine Telephone & Telegraph stock in March, 1910. This stock was worth about \$20 per share, and the transfer to me was a part of the same transaction whereby I purchased the Visitacion Valley Lots, the Beach Company's stock and other property enumerated by me in my testimony, but this Philippine stock had slipped my mind and I forgot to mention it. Should you, or Commissioner Krefft, wish me to correct my testimony in these particulars, I will, of course, do so gladly.

S. G. HARVEY.'

"I sent that letter to Mr. Williams. By the statement in that letter that I have 'of course been there a number of times since 1905.' I mean that I was putting in and taking out things that I wanted. The articles in there were of little value, but I from time to time put them in and took them out. The things

(Testimony of Mrs. S. G. Harvey.)

that I put in that box were not papers or documents of value or shares of stock, but more my personal things, my jewels, my jewels were not worth mentioning, but I put them in and took them out as I felt like it.

“I did not take the stock of the Shore Line Investment Company with me to Paris, but I did take it to Monterey, because I knew that I could not leave my old mother, who was down there with me, and thought it was safer and nicer and better there. I was going to Monterey for my home. I was an invalid when I came from Europe and I had to go to Monterey for absolute rest, and I thought it was much easier to take all of my things with me. It was easier by far than going to town for things that might be needed. During my visit abroad this stock rested in my safe in Webster Street. I didn't care to put it in my safe deposit box. It was my wish to leave it in my safe.

“Mr. Harvey personally collected the dividends on the stock of the Shore Line Investment Company. I had a bank account during 1905, 6 and 7, during some portion of these years and in 1908 and 1909 at the First National Bank. Mr. Harvey made deposits in the bank for me during those years, but had no power to draw on that account. The dividends from the Shore Line Investment Company were deposited in that bank account. I [124] received \$21.00 a share, amounting to some eleven or twelve thousand dollars, at approximately the dates the dividends were declared. Mr. Harvey had no

(Testimony of Mrs. S. G. Harvey.)

power of attorney from me and no letter. He just collected the dividends and put them in my account. During those years I drew checks to Mr. Harvey's order on that particular account. I received my first certificate of stock in the Shore Line Investment Company in June, 1905. I have a memorandum of those dates which I now hand you. This memorandum shows that on June 26, 1905, I received 300 shares of stock in the Shore Line Investment Company. I received these shares from Mr. Harvey. He delivered them to me on Webster Street and I thereupon put them in my safe. I never took that certificate out of that safe until I exchanged my safe, except that Mr. Harvey had the certificate in 1907.

"I never asked to have these certificates, which Mr. Harvey gave me, transferred in my name until November, 1909. Mr. Harvey applied to have the transfer made, I did not.

TESTIMONY JANUARY 11, 1912.

"The safe which I took to Monterey was a little bit higher than my lap. I should say about two and a half feet in width, or about the size of this chair. Maybe a little bit higher and not quite so large. It was a regular iron safe. I alone had the combination to the safe and kept it in my room. During my absence in Europe, during 1906, my house was occupied by my mother, my daughter and my husband, but none of them had the combination to my safe. The stock was in the safe during that time. Lizzie Anderson was my maid during 1906; she had the combination to my safe. She frequently opened

(Testimony of Mrs. S. G. Harvey.)
the safe at my bidding.”

Referring to a subsequent portion of the testimony of Mrs. S. G. Harvey before the Referee in Bankruptcy, counsel [125] for plaintiff read the following:

“During the year 1905 I did not have in my safe deposit box the shares of the Shore Line Investment Co. I made a mistake in my testimony and want to correct it. On thinking it over I kept this stock in my own safe in my house. Some keepsakes and antiques I had in the safe deposit box. My other jewels I had with me. Outside of this, the safe deposit box contained nothing really of value. The letters which I had there were personal letters which I kept, and had no particular value.”

Subject to the same objection, counsel for plaintiff further offered in evidence a letter dated “San Francisco, December 19, 1911.

E. H. Williams, Esq.,

San Francisco, California.

Dear Sir:—

If you wish to learn from the Safe Deposit Company the dates on which I visited my safe deposit box, I have no objection whatever, and am perfectly willing that the bank officials shall give you the information, and you may tell them so for me.”

It was admitted that this letter was in Mrs. Harvey's handwriting.

Counsel for plaintiff then offered to read into the record entries taken from the books of the Safe Deposit Vaults showing the dates of the visits of Mrs.

(Testimony of Mrs. S. G. Harvey.)

Harvey to her box, during the years, 1906 to 1912, inclusive.

To this evidence, counsel for the defendant S. G. Harvey objected as immaterial, irrelevant and incompetent and to the accuracy and completeness of the record.

Counsel for plaintiff then read into the record the following entries, which showed that Mrs. S. G. Harvey visited her safe No. 1629, at 11 o'clock A. M., of September 13, 1906; that Lizzie Anderson, her maid, visited her box December 5, 1906, at 3:50 P. M.; Mrs. S. G. Harvey visited her box at 1:19 [126] on December 14, 1906; Mrs. S. G. Harvey visited her box February 18, 1907, at 12:16; Lizzie Anderson, her maid, at 4 o'clock September 16, 1907; Lizzie Anderson, her maid, at 2:04 P. M. of August 15, 1908; Mrs. Harvey at 10:55 A. M. September 28, 1908; Mrs. Harvey again 3:43 P. M. January 20, 1909; Mrs. Harvey again 3:29 P. M. of July 15, 1909; Mrs. Harvey again 12:60 August 9, 1909; Mrs. S. G. Harvey, 12:17 P. M. April 29, 1910; Mrs. S. G. Harvey 10:27 May 11, 1910; Mrs. S. G. Harvey May 12, 1910, 11:02 A. M.; Mrs. S. G. Harvey 12:21 May 13, 1910; Miss Ella Smith, maid, July 5, 1910, 1:19 P. M.; Miss Ella Smith, maid, 8:26 P. M., July 6, 1910.

It was admitted that after giving the testimony on December 5th, there was no record that Mrs. Harvey visited the safe deposit box prior to the time of changing her testimony.

[Testimony of Edwin H. Williams, for Plaintiff.]

EDWIN H. WILLIAMS, a witness called on behalf of plaintiff, after being duly sworn, testified as follows:

“I am an attorney at law, and am one of the attorneys for the Trustee in Bankruptcy in the proceeding against J. Downey Harvey. I have been such ever since a Trustee was appointed. I was present in the office of the Referee in Bankruptcy on the 19th day of December, 1911, and was handed the letter from Mrs. Harvey, recently introduced in evidence.”

To a request that he state the circumstances under which that letter was handed to him, counsel for the defendant objected as being immaterial, irrelevant, incompetent and *res inter alios acta*. The objection was overruled, and the witness further testified:

“At this time Mr. J. K. Moffitt was put on the stand and sworn as a witness, and his testimony was taken at some length, covering at least ten minutes of the hearing. When I questioned [127] him in regard to the record of Mrs. Harvey’s visits to the safe deposit vaults, an objection was taken by Mr. Cushing to producing those records, and after that Mr. Harvey got up from his seat and handed me a letter, the one you speak of. The Referee on a prior occasion had announced that we were entitled to have those records exhibited, in so far as they had a bearing upon the visits which Mrs. Harvey claimed to have paid those vaults in order to deposit this stock, and the objection had been taken at this particular hear-

(Testimony of Edwin H. Williams.)

ing by Mr. O. K. Cushing, and my recollection is that the Referee had made no ruling, but he had indicated what his ruling might be."

Cross-examination.

"The letter was handed me at the hearing of December 19th, 1911. The ruling of the Referee permitting us to ascertain what time Mrs. Harvey had visited her safe deposit box in connection with the stock of the Shore Line Investment Company, had been made at an examination held before the Referee on December 6th or 7th, 1911. Mrs. Harvey was not present when this ruling was made. Mr. Cushing appeared as attorney for the corporation and made a very strenuous objection to producing the records. Mr. Moffitt was called again on December 19, 1911, and again the Company objected to producing the records. Mr. Harvey then came forward with this letter. I think Mr. Harvey had been in the room since the commencement of the proceeding, but I am not positive. He interrupted the proceeding while Mr. Moffitt was on the stand and handed me this letter."

Redirect Examination.

"Between the time when the first objection was made by the corporation to producing its safe deposit records, and the renewal of their objection on December 19th, I did not, nor did anyone with my authority request Mrs. Harvey's permission to [128] know the dates on which she had visited her safe deposit."

[Testimony of J. A. Schaertzer, for Plaintiff.]

J. A. SCHAERTZER, a witness called on behalf of plaintiff, after being duly sworn, testified as follows:

"I am a Deputy Clerk of the United States District Court, Northern District of California. I have the custody of the records of that Court, including the records of a case brought therein entitled, Baldwin Locomotive Works vs. Ocean Shore Railway. The record consists of the complaint and an order appointing a receiver."

Counsel for plaintiff thereupon offered these documents in evidence, to which counsel for the defendant S. G. Harvey, objected as immaterial, irrelevant and incompetent and as not being in rebuttal, and not being a substantive circumstance tending to impeach the testimony of any witness on the stand. The objection was overruled by the Court.

Mr. WHEELER.—"I cannot make it too clear that we admit that if this transfer by handing the certificates to Mrs. Harvey, this gift, was made in 1909, there is nothing for your Honor to do but to decide this case against us. Our defense does not hinge around 1909 at all; in other words, we contend that the transfer was made in 1905, by endorsement of the certificates."

Said complaint shows that it was filed in said Court on December 6th, 1909, in action No. 15,008; that it was verified by Charles P. Eells, and that it alleged among other things the following, that for more than six months prior to the date of said complaint the

Ocean Shore Railway Company had been wholly insolvent and unable to meet or discharge its debts or liabilities as the same came due, and that it had failed to pay the claim of the plaintiff in the case because of its insolvency and inability to obtain funds so to do. [129]

Plaintiff alleged on information and belief that in addition to plaintiff's claim there were outstanding unsecured claims and indebtedness in favor of various creditors of the Ocean Shore Railway Company in the sum of upwards \$1,900,000.

It alleged that all the property, real and personal, belonging to said corporation or thereafter to be acquired by it had been conveyed by said company in trust to secure the payment of bonds for the sum of \$5,000,000; that all of said bonds were issued and outstanding and constituted a first lien against all the assets of said company to the extent of \$5,000,000.

It alleged that all the assets of said corporation, if presently disposed of, would not yield sufficient funds to pay the amount of its bonded debt, and the bonded debt could not be paid in full, and nothing would be left for unsecured creditors, whose claims exceed \$1,900,000.

It further alleged that said corporation was engaged in constructing a railroad; that the railroad was unfinished; that the company had no funds to complete the work; that its franchises were in danger of forfeiture; that the unsecured creditors had threatened to sue the company and attach the same and that the appointment of a receiver was necessary

in order to prevent said suits and attachments and the threatened forfeiture of the company's franchise. Said complaint was signed by Goodfellow & Eels, as attorneys.

The plaintiff thereupon rested. [130]

[Testimony of J. Downey Harvey, for Defendants.]

J. DOWNEY HARVEY, a witness called on behalf of defendant, after being duly sworn, testified as follows:

"I am the insolvent referred to as J. Downey Harvey. I am the husband of the defendant, Mrs. Sophie H. Harvey. We were married January 11th, 1883. We have two daughters, both married. I was one of the organizers and incorporators of the Shore Line Investment Company, incorporated in May or June, 1905. Prior to the incorporation, I visited the lands subsequently deeded to the company. My wife was with me on the occasion of my first visit. In the party were James D. Phelan, Edward Tobin, Mr. and Mrs. Thomas Magee, J. B. Rodgers, afterwards chief engineer of the Ocean Shore Railroad and the man who laid the line out for the Ocean Shore Railway and A. D. Bowen, one of the original promoters and afterwards general manager of the road."

To a question as to whether anything was said on that occasion with regard to the intended incorporation of the company, counsel for plaintiff objected as irrelevant, immaterial and incompetent, not binding upon the plaintiff, and not within the issues made

(Testimony of J. Downey Harvey.)

by the pleading. The objection was overruled, and the witness continued.

"We all went over the country on a visit preliminary to my taking an interest in the Ocean Shore Railway. It was about decided that I was going into the organization of that company, and we had in contemplation besides that the acquisition of real estate along the line. It was intended as an investment or improvement land company, and I showed Mrs. Harvey where the principal holdings was to be on the north end of Halfmoon Bay, now known as Granada, and I told her we were about to acquire property there. It was to be our principal holding and I showed her later in the day, over the property [131] that we had in view. I told her at that time that I was going to give her my stock that I would acquire in that land company. After the acquisition of the land, and the organization of the company, the stock was issued to me in June, 1905, one lot, another lot in August, 1905, and two lots in September, 1905. Stock certificates were issued to me and when I received them I endorsed them and gave them to Mrs. Harvey in conformity to what I told her I was going to do. I took them and handed them to her and told her that they were the certificates of the Shore Line Investment Company; that she was interested in as I had promised her, and I told her to keep them and take care of them, that they were of value and that they were endorsed. And I said to her that the reason I am retaining them in my name is that I am very largely interested in the Ocean Shore Railroad,

(Testimony of J. Downey Harvey.)

and these two companies are associated in the development of one another, one depends upon the success of the other. If I keep this stock in my name, which I will want to do, I will show the people that the Ocean Shore Railroad is interested in the success of this land company, and that I am a large holder in it and that at all times I will be ready to help out Granada as much as we can.

"I became President of that corporation, I think, in January, 1906. Up to that time I had been vice-president, one of the incorporators, and a director. In April, 1907, I paid a \$10.00 assessment on that stock. I had no conversation with Mrs. Harvey in regard to the assessment. Mrs. Harvey was east with one of my daughters and I wrote her the assessment had been levied and that when she returned I would get the stock and have the receipt entered on it. When she returned I did get the stock. I did not say anything to her regarding whether or not I would pay the assessment. When I gave her the stock no assessment was contemplated, and I naturally felt that since I [132] had given her a gift at that time, I ought to follow it up and pay the obligations that would fall on it. I did pay the assessment and wrote her to that effect to New York when she was there. My intent in paying the assessment was to make an additional gift which would naturally follow this present of stock. I told her if I acquired more stock I would give it to her, and I felt it my duty to take care of the assessment and make a gift of it as I had of the certificates themselves. The total

(Testimony of J. Downey Harvey.)

paid by me for the stock, including the assessment was \$23,000 and some odd dollars, I think \$650 or something like that.

“Among my present creditors there are none who were at that time unsecured. At the time I gave Mrs. Harvey this stock I was easily worth over my obligations from half a million to \$750,000. In 1907 when I paid the assessment, I was worth the same amount. I did not make any other gifts to Mrs. Harvey before that time, but within a year or two afterwards, I gave her a few shares of the Santa Cruz Beach Co. The original investment there cost me \$4,000.00 and I gave her half of it in 1907 as a gift. I later sold her the balance with some other properties. In the early part of 1905, I gave her a building lot on Pacific Avenue. This cost me between \$13,000 and \$15,000.

“After giving these certificates to Mrs. Harvey I got one of them back. Mr. Horace Pillsbury, who was a director in the Shore Line Investment Co., was in the east and I asked Mr. J. A. Folger to act as a director, he being a director in the Ocean Shore Railway Company. Up to that time we had the same directors in the two companies, which was a great convenience as we had a meeting of one company immediately after the meeting of the other. Mr. Folger was always present at the earlier meeting of the Ocean Shore Railway Company, and it was [133] easy for him later to attend the meeting of the Shore Line Investment Company. In San Francisco, after the fire, it was very difficult to secure meetings. Mr. Folger consented and I took a block

(Testimony of J. Downey Harvey.)

of 66 shares which I had Mrs. Harvey give me and placed it in his name. He endorsed this stock and returned it to me and I returned it to Mrs. Harvey. He remained with us about a year and when Mr. Pillsbury returned from the east, Mr. Folger resigned. Mr. Pillsbury was re-elected and this stock standing in Mr. Folger's name was received from Mrs. Harvey and placed by me in my name and I then returned the certificate endorsed to Mrs. Harvey.

"It was in December, 1906, that I first got this stock from Mrs. Harvey. It was transferred from my name unto that of J. A. Folger, where it remained until December, 1907, when it was retransferred into my name and was endorsed and delivered to Mrs. Harvey by me. Mrs. Harvey had Mr. Folger's certificate endorsed by him. The transfers were attended to by me. I got the certificate on each occasion from Mrs. Harvey and took it to the secretary and returned it to her. There was no other transfer of this stock between the time that I gave it to Mrs. Harvey and its actual transfer in November, 1909. At that time I had the stock in my possession, that is, I did not have it in my possession except for that purpose.

"Early in November, 1909, we were negotiating for a loan to pay off our indebtedness in the Shore Line Investment Company, and the parties that we were negotiating with made a qualification that this loan required the large stockholders, in fact, nearly all of the stockholders should sign an agreement, pledging themselves, with their stock, to meet this obligation

(Testimony of J. Downey Harvey.)

if the Company could not. I was then notified by the General Manager, that it would be necessary for me to produce these certificates of stock, as he wanted to see how much stock he could acquire [134] for this purpose. When he came to me I said, 'As you know, that is Mrs. Harvey's stock and I will have to get it from her. She is down at Del Monte and it will probably take a day or so. I will communicate with her and get the stock.' I got the stock from Mrs. Harvey and turned it over to Mr. Fay, General Manager of the Shore Line Investment Company who was negotiating for the loan. I said, 'Mr. Fay, if Mrs. Harvey has to sign this stock agreement, being the owner, the stock will have to be put in her name now.' He said, 'Not now; I am just collecting the stock to see how much I can get. When the time comes, Mrs. Harvey will have to sign the agreement, and the stock will have to be put in her name, but at this time I do not need it. What I want to see is how much stock I can get for this purpose.'

"I gave this stock to Mr. Fay. They were in my name, but had my endorsement on them. I received them back from Mr. Fay around the 26th of November, or a little before. As negotiations were still going on, and the same obligation would be insisted upon by any bank making a loan, I had the stock transferred to Mrs. Harvey's name.

"I receipted for the stock, but Mr. Corbet said, 'I will have to have Mrs. Harvey's receipt. I will give you a receipt.' He dictated one to his stenographer which he handed to me and which I took

(Testimony of J. Downey Harvey.)

or sent to Mrs. Harvey. This was returned to me and the certificates were given to Mrs. Harvey later. The negotiations for the loan kept up until sometime in December. On December 9th, we levied an assessment. We did not make the loan, because our payments commenced to come in and we were able to discharge our obligation and collected sufficient money to satisfy our creditors. It was while these negotiations were pending that I had the stock transferred to Mrs. Harvey's name. At the conclusion of the negotiations I sent the stock to Mrs. Harvey. I either sent the stock to Mrs. Harvey, or took [135] it down to her myself to Del Monte. I have never had the certificates in my possession except as I have testified here, from the time they were first delivered until this action was commenced. The suit of the Baldwin Locomotive Works had nothing whatever to do with the transfer of that stock. Neither the fact that such suit was to be brought, or that any suit might be brought against me."

Cross-examination.

On cross-examination by counsel for the plaintiff, witness testified as follows:

"I was never the owner of the stock in question here, 546 shares of the Shore Line Investment Company. I bought it for Mrs. Harvey. I never considered it mine. It was my money which purchased the stock, but I acquired it for my wife. I was never connected with the stock in any way, except to vote it and carry out the duties of an officer of the cor-

(Testimony of J. Downey Harvey.)

poration. Immediately on acquiring the stock I regarded it as her stock.

“I have seldom had occasion to examine my private ledger and have seen more of it lately than in 12 years past. I had bookkeepers from 1905 to 1909, whom I regarded as competent men. I did not aid them in keeping their books. They kept them as they saw fit. I might have given them some memoranda, but never assisted them in carrying it out. Very few memoranda were necessary. The books were made up from my cash-book, or I should say from my check-book. When an entry was to be made regarding a matter exclusively within my own knowledge, I furnished the information to the bookkeeper. This was generally by a memorandum, but might be verbally. I did not deem the entries in my books of importance to anybody but myself. I did deem them, in a measure, of importance to myself.

“I have no particular fault to find with the method of [136] keeping my books. They were simply a record of whatever properties I had, real estate which had come into my hands through inheritance or otherwise, and the only thing which I put into my books of information to me, were my check-books, in receiving my cash and checking it out. Nothing was likely to happen to property standing in my name, and I did not have occasion to go to my books, once a year. When the fire occurred my private matters were lost sight of. I took charge of the Ocean Shore properties, being President of the road, and my time

(Testimony of J. Downey Harvey.)

was entirely devoted to the affairs of the Ocean Shore Railroad and the Shore Line Investment Company. I had no personal business with outside persons which required me to interest myself in the keeping of my books. I was not conducting a commercial business and had no occasion to go to my books. As Mr. Crosby told you they were not written up for 18 months. It was my intention that the books should indicate a true state of my affairs to my satisfaction."

The attention of the witness was then called to page 44 of the ledger, under the head "Shore Line Investment Company" and to the notation, "This stock was purchased for Mrs. Harvey and belongs to her."

Witness further testified: "That notation was made by Mr. Crosby. He took charge of my books March 1st, 1908, and the entry is in his handwriting. It is very likely that I told him to make the notation. This was probably when he took charge of the books, or when he drew it to my attention. I could not tell you the month or year it was when I gave him that direction. I testified in this matter before the Referee in Bankruptcy and the following questions and answers were asked and given by me. 'Q. When was that notation made? A. That was made when Mr. Crosby took charge of my books. Q. In what year? A. Well, I think he took charge [137] of my books in 1909. It should be 1908? A. Yes.'"

"The reason that I did not have these shares of stock transferred to Mrs. Harvey in 1905, was as I

(Testimony of J. Downey Harvey.)

have testified, that we had just formed these two companies, and the Shore Line Investment Company depended upon the building of the Ocean Shore Railroad. I was the largest stockholder in both companies and thought that my association and prominence with the Ocean Shore Railroad would help the Shore Line Investment Company. There was a great deal of rivalry down that way as to this land business, and if we could make an association between the two, it would make the people who purchased at Granada feel that they were going to get a good railroad service, and if there was any favoritism or help to be had from the association with the railroad, we wanted to get it. If I was not connected with the Shore Line Investment Company, its position would be just the same as the other companies not associated with the railroad. There were other real estate companies formed. There was one called the Ocean Shore Land Company, which was very misleading, and it made many people believe that the Ocean Shore Railroad Company was interested in the development of the Ocean Shore Land Company. They took half our name and used half our name to designate their business, but we had no association with them whatever. There were several things arising like that so that it afterwards turned out to be of immense benefit that I retained my identity as a stockholder in the Shore Line Investment Company. As a matter of fact the men who furnished the money to build the Ocean Shore Railway Com-

(Testimony of J. Downey Harvey.)

pany put up the money to finance the Shore Line Investment Company.

“There was a close connection between the two companies through the people who formed them. There was no money connection between the two companies. The original stockholders [138] were the same.

“Referring to my trial balance, these books were not gotten up for public inspection. No human being ever saw them until they fell into the hands of my trustees, and I never expected that any such occasion would arise. They were intended solely for my private guidance in my private business transactions. It was not my intention that the stockholders of the Ocean Shore Railroad, or its creditors, or its directors, or any other organization should inspect my books.

“Referring to my trial balance made up in February, 1906, I was not in the habit of examining my trial balances. I had no interest in them. My purpose in maintaining bookkeepers was to write up my books once in a while and look after them, but mostly my check-book which I always had written up every month to know my condition. I have no recollection of examining any trial balance of the year 1906. I could not say that I did not. I have no recollection of having done so.

“Referring to the trial balance of December, 1906, and the entry of \$23,610, I did not furnish the bookkeeper with that data to make up that account. He took it from the books. I had nothing to do with it.

(Testimony of J. Downey Harvey.)

I never discussed with Mr. Crosby the valuations of my various properties. I might have done so with Mr. Wasserman in 1904 or 1905. I never examined my trial balance in the years 1905 to 1910. I never knew of this book at all, never saw the book. I did not know that Mr. Wasserman kept the book. It was only recently that I knew that Mr. Crosby kept it. Up to that time I did not know that they had been keeping a trial balance. I knew that there was a ledger and cash-book and a journal. I never looked into the journal and never looked into the ledger in relation to the Shore Line Stock. I do not remember ever having looked into them with respect to my other investments. There was no reason [139] for my avoiding an examination of the Shore Line Investment Company stock. I never considered it my property. It passed out of my hands, was given to Mrs. Harvey, and I did not consider it mine at all. I never saw any entry of it in my books and did not know until a long time afterwards that it was entered there as my property.

"Referring to the letter dated September 22, 1907, written by Mr. Wasserman, I did not receive it. It might have come into my possession, but I do not remember when I received it. This is a carbon copy and I have not the original."

Mr. SCHLESINGER.—Q. "I will ask you whether or not upon receiving this statement, of which this is conceded to be a carbon copy, you notice that Mr. Wasserman had included in your list of assets under this caption upon page 3, 'besides the

(Testimony of J. Downey Harvey.)

above you should take into consideration the following,' due from Rodgers and other assets mentioned, and finally, 'Shore Line Investment Company, 23,610'—do you recall whether or not upon an examination of this statement furnished to you by your bookkeeper that you examined and noticed that particular item?"

A. "Yes, but the way he places it he does not consider it one of my assets."

Q. "I will ask you to answer my question yes or no."

A. "Will you please read the question?"

(The last question repeated by the Reporter.)

A. "Well, I noticed that item but I did not consider it as a part of my assets."

Q. "Will you kindly answer the question?"

A. "I never did."

Q. "I ask you whether you noticed the item?"

A. "I noticed the item."

Q. "Did you discuss the matter of this report with Mr. Wasserman?"

A. "I do not think I did." [140]

Q. "Never had a word of discussion with him?"

A. "Not to my recollection."

The witness then further testified as follows: "The reason that this stock appears in my books as my individual asset during all of these years, is that Mr. Wasserman probably entered it that way. I never noticed it to tell him not to do it. They were my private books and no one would be benefited by access to them. The stock was not mine. It was in

(Testimony of J. Downey Harvey.)

the possession of Mrs. Harvey, and it never entered my head at all about it. It had passed from my mind. In addition to this gift I bought her a lot on Pacific Avenue where we intended to build.

“Referring to my trial-balance book I find that the Pacific Avenue lot was carried as my asset from March 31, 1905, up to July 31st, 1905, in the year 1906 it is omitted. The books are not correct as to this lot, because I gave it to Mrs. Harvey on February 28th, 1905, and according to this book it still belonged to me in July 31, 1905. The Pacific Avenue lot appears in the trial-balance book as my asset until December, 1905, and then it is dropped, but the Shore Line Investment Company is carried as an asset in my trial-balance book all the way through.

“Regarding the entry in the ledger, this stock was purchased for Mrs. Harvey and belongs to her. I suppose I mentioned this matter to Mr. Crosby when he took charge of my books, and that he made the entry. He knew the fact before he took charge of the books. The way he knew was when the assessment was to be paid I handed him my check and received from him a receipt. I said that I could not get him the stock because it belonged to Mrs. Harvey, and that I could not get it until she returned from the east. The assessment was paid April 13, 1907. The assessment was not charged to the account of Mrs. Harvey, it [141] was paid with my money. I also paid an assessment on one hundred shares of Ocean Shore Railway stock for Mrs. Harvey. I do not remember whether that was charged up against

(Testimony of J. Downey Harvey.)

her or not. The books will show.

“There has been an account in my books under the caption of ‘Family Gifts and Allowances.’ It was started many years ago. As to whether that account truly indicated just what gifts and allowances I made, I never gave any thought. I hoped it was; I did not want it to be incorrect, but gifts to the family made very little difference. No one would have occasion to observe the matter. It was one of my own privilege. When I made gifts and allowances, these matters were not discussed by the bookkeepers with members of the family, nor did I give them instructions. I left it to them. I think my check-book would show this in every case. If a check was to my daughter for schooling, I presume the bookkeeper would note it under this head. For a household matter, likewise. I never gave him any directions. He used his own judgment.

“With regard to the gift of these shares of stock to Mrs. Harvey, I might have mentioned it to Mr. Wasserman in 1905. In 1906, the subject was never brought up. In 1907, I did in relation to the assessment. In 1908, I did not. The time that I mentioned it to him was prior to this report, exhibiting my affairs. I did not ask him to eliminate from that report the item of the Shore Line Investment Company. There was no necessity for it. As I read the report, he did not consider it one of my assets. He includes it with other items due from Mr. Rodgers for three assessments paid. I never expected Mr. Rodgers to return that money to me. Mr. Wasser-

(Testimony of J. Downey Harvey.)

man knew that. In reading over this statement I did not segregate and give any particular attention to the Shore Line Investment Co. item. I did not look upon those shares as any asset of mine, [142] nor the Rodgers note for the assessment that I paid on Ocean Shore stock. I have no recollection as to the closing part of the letter. I never discussed any of my affairs with Mr. Wasserman from that standpoint. I do not even know whether I read the letter. I did not regard the matter as of much importance, I voted this stock at all times and used my own judgment as to the property."

To a question as to whether the witness was at that time familiar with the affairs of the Shore Line Investment Company, counsel for the defendant S. G. Harvey objected as immaterial, irrelevant and incompetent and not proper cross-examination. The Court overruled the objection, and the witness answered, "I was."

The witness then further testified as follows: "I knew what my assets were, without the necessity of the process of bookkeeping. So far as I recall, I did not invite this record from my Secretary. I did not consult him on matters of that kind and gave him pretty full sway about things. I never gave any instructions to have my books kept so as to deceive me."

Referring to the cash book, the witness read the following items:

"Ocean Shore Railway Company assessment

No. 7, Stock from Mrs. J. D. H. at \$3.00.	\$300.00
Cash.....	50.00
W. E. Fuller & Company bill.....	1.50"

(Testimony of J. Downey Harvey.)

Redirect Examination.

"From my examination of my books, concerning the gift of a lot to Mrs. Harvey, the item was carried, according to the trial balance, as my property until December in 1905, and the gift was made on the 28th day of February, 1905. This was the Pacific Avenue Lot. I do not know how many trial balances were taken. I never concerned myself about that."
[143]

[Testimony of Charles W. Fay, for Defendant.]

CHARLES W. FAY, a witness called on behalf of the defendant S. G. Harvey, after being duly sworn, testified as follows:

"I am the general manager of the Shore Line Investment Company. I have held that position since January, 1906. I met Mr. Harvey very frequently. My business called me into consultation with him constantly, almost every day, and about that time he informed me —"

To this testimony counsel for the plaintiff objected as immaterial, irrelevant and incompetent and self-serving. The Court overruled the objection, and the witness continued:

"Mr. Harvey told me at this time that this stock was Mrs. Harvey's. This was in 1906. I recall the circumstance of a negotiation with reference to paying off some indebtedness of the Shore Line Investment Company, in 1909. As General Manager of the Shore Line Investment Company, I was authorized to negotiate for a loan to clean up this indebtedness. I negotiated with a certain banking institu-

(Testimony of Charles W. Fay.)

tion here, and one of the conditions was that the stock of the various stockholders, or at least 90% of them was called for, for the purpose of securing this loan. Also, that an agreement should be signed by the owners of the stock, holding themselves proportionally liable for the amount to be borrowed. I called on Mr. Harvey and asked him for the stock held in his name in this Company, explaining my purpose. He said he would get the stock; that it was Mrs. Harvey's stock. I asked him how long it would be, and he said he would have to send for it; I believe that Mrs. Harvey was then at Del Monte. Two or three days subsequently I called on him and he gave me the certificates of stock standing in his name, endorsed. They did not remain so very long in my possession. I was collecting it for the trustee who was to hold the stock. I judge that it was either in my possession, or in his, for [144] probably thirty days. The negotiations did not go through, and subsequent to that time there was an assessment levied on account of the demand of the French Bank for a payment on their loan. I gave the stock, I think, to Mr. Guggenheim, who was to hold this and the other stock. I do not recall whether I returned it to Mr. Harvey, or whether he got it back from Mr. Guggenheim direct."

Cross-examination.

"I first had physical possession of these shares of stock in October or November, 1909. I received them from Mr. Harvey."

[Testimony of Mrs. S. G. Harvey, for Defendant.]

Mrs. S. G. HARVEY, called in her own behalf, after being duly sworn, testified as follows:

"I am the defendant S. G. Harvey in this case and am the wife of J. Downey Harvey. Mr. Harvey handed me certificates of stock of the Shore Line Investment Company, in 1905, as he got them; in San Francisco, some of them. The only communication I had from him was when I was in New York to the effect that there had been an assessment and that he had paid it and when I came home I gave him the certificates. These had remained altogether in my possession from 1905 until 1909 with the exception of the time of the payment of the assessment, and the changing of the shares to Mr. Folger, as has been testified here. I had the certificates continuously in my possession and they were endorsed."

Cross-examination.

"I testified before the Referee in Bankruptcy, December 5th, 1911. Mr. Harvey gave me the stock certificates in the middle of 1905, the first one in June. I recall the date of the certificate, [145] but not the date of his giving it. I made a memorandum of this date when I received the certificates. I saw that memorandum this morning. I could not remember whether it was pencil or ink. I took the dates of the certificates and not the dates of their receipt. I made the memorandum at the time I got the certificate, but simply took the date of the certificate and not the date when I received it. I made that memorandum on the date that I received the

(Testimony of Mrs. S. G. Harvey.)

stock. I received the next stock in August, and on the same memorandum made a note of the date of that certificate. Likewise as to certificates received in September. The dates on the certificates were approximately the dates on which they were received."

A memorandum was then handed to the witness who testified: "No, this is not the original memorandum. This is my handwriting. I took it from the memorandum I had taken at the time—the dates of these certificates. I made this at the beginning of the trial. The original memorandum which I made were on slips of paper which I pinned together, but they were not the dates I received them. I have not the slips. I made this memorandum and destroyed them. I kept the slips from 1905 up to the time I made this memorandum. I entered on a little slip of paper the number of shares and the date of the particular certificate whenever I received one from Mr. Harvey. About December 5th, 1911, I copied them off on this memorandum and destroyed the slips. This memorandum is in my handwriting."

Said memorandum was thereupon offered and admitted in evidence and marked Exhibit No. 9.

Exhibit No. 9.

"300 shares delivered June 26th, 1905;
On August 22nd, 1905, received 40 shares;
On August 22nd, 1905, received 26 shares;
On September 22nd, 1905, received 180 shares."

[146]

The witness then further testified: "It was my

(Testimony of Mrs. S. G. Harvey.)

custom to make memorandums of the gifts which I received; the few that I did receive. All of the other slips have been destroyed likewise. I do not think I have any memorandum now of anything. No one suggested that I make such memorandums. I think my memory was good on December 5th, 1911, I tried to make it so."

Redirect Examination.

"This memorandum was made by me in response to a request by the Court, and at that time I used the slips I spoke of, afterwards destroying them. The items shown on this memorandum were taken from my separate memorandums of these different transactions and not from any other source. With regard to the letter that was offered in evidence, expressing my allowance to have them secure the information from the safe deposit; that letter was drawn for me by my counsel, Mr. Wheeler. This occurred on the same day when I transcribed it. I gave it to my husband to be delivered to the Court. I told him to deliver it immediately, and to hurry. When I was first on the witness-stand, I testified that these certificates were in my box in the safe deposit. I had had no counsel or advice before attending that hearing."

Mr. SCHLESINGER.—"I object to that as immaterial, irrelevant and incompetent. It would be a novel proposition to lay down as the excuse for not testifying correctly that the fact is not the subject of counsel."

The witness then further testified as follows:

(Testimony of Mrs. S. G. Harvey.)

[147] "I went over the transaction in my own mind in a certain vague way. I did not know what questions I was going to be asked and I answered just as I then remembered. I thought at that time I had put this stock in safe deposit. There was also mentioned in the letter an item which I had omitted and which I did not recall upon the stand, and that I also put in my letter. After I had written the letter I went on the stand and made correction of my testimony."

Counsel for the defendant stated, "I will have to read to you something that is already in evidence," and then read into the record a portion of the testimony of the witness taken before the Referee in Bankruptcy, previously offered in evidence by the plaintiff, as follows:

"Q. Did you also have in the safe shares of stock owned or controlled or held by you in any other corporation or corporations? A. No, I did not.

Q. Where did that stock rest?

A. It rested in the safe.

Q. I am talking of shares of stock held by you in other corporations. Where did those shares rest during those years—the shares of stock which you have mentioned in your testimony?

A. My different papers rested in my safe at Del Monte.

Q. Your safe in Del Monte? A. Yes.

Q. That is what I am asking you, whether or not you kept in that same safe all other shares owned,

(Testimony of J. Downey Harvey.)

controlled, or held by you in that same safe. Your answer is 'Yes.'

A. Yes, whatever papers I had, I had in that safe.

Q. Did you ever take any jewelry with you to Monterey? A. Yes.

Q. That also was placed in that safe, was it?

A. Yes.

Q. Then do I understand, Mrs. Harvey, that all of your valuable papers, evidence of ownership in corporations, shares of stock, and other valuables, including your jewels, were not held by [148] you in your safe deposit box in the First National Bank Vaults but in this safe?

A. Yes—I beg pardon; there was a little old match box, belonging to my uncle in the safe deposit box, some antiques; but my usual jewels I had with me.

Q. And your answer is 'Yes' with respect to all valuable papers? A. Yes, sir.

Q. And outside of this little antique match box that deposit box contained nothing really of any value? A. No.

Q. The letters which you had in the safe deposit box were of no particular value?

A. Just personal letters that I used to keep, but they had no particular value that I remember.

Q. Then to sum that matter up briefly, that branch of it, Mrs. Harvey, I understand that that safe deposit box which you kept and paid for during the years 1906, 1907, 1908, 1909 and 1910, that particular safe deposit box contained nothing of value aside from this antique match box which you of course

(Testimony of Mrs. S. G. Harvey.)

highly prized, and some letters which had little value to you? A. Yes."

Earlier in the same testimony, however, the same witness had said—(reading):

"Q. Where was that safe deposit box?

A. In the First National Bank.

Q. In the year 1907 did you have a safe deposit box? A. I did.

Q. In the First National Bank vaults?

A. In the First National Bank vaults.

Q. Did you have any other safe deposit box during that year?

A. No." And the same answer as to the other years down to 1910.

"Q. Did you keep in that box various shares of stock, Mrs. Harvey?

A. I kept my letters and things of that sort, sometimes shares, sometimes not.

Q. During the year 1905 you had in that box certain shares of stock of the Shore Line Investment Company?

A. I did not. I [149] made a mistake in my testimony, that is the reason I wanted to correct it.

Q. Did you ever have any shares of stock in the Shore Line Investment Company in your box of the First National Bank vaults at any time?

A. No, I think not. On thinking it over I kept it in my own safe.

Q. I take it that at no time during any of these years did any of the shares of stock either in the name of J. Downey Harvey or your name, or in-

(Testimony of Mrs. S. G. Harvey.)

dorsed to you, or in your possession ever rest in the box—

A. (Interrupting.) Of the Shore Line Investment Company, no.

Q. But you did have during those years shares of stock in other corporations—

A. I had other papers, yes.

Q. Are you able to mention without specifically giving me the number of shares, what other shares of stock you had of other corporations in that box?

That question was not answered.

Q. You did have, Mrs. Harvey, shares of stock in other corporations belonging to you?

A. I don't think I did, no. I had some shares of stock but I don't think I had them in the safe deposit."

The witness then continued: "Since that testimony was given I went to my safe deposit box. At the time I testified I could not recall anything more as being in that box except the articles I testified to, but when I went to the box I found other papers besides those letters, including two old deeds and another antique, two or three. I found Mr. Harvey's will and my own will. At the time I testified, I had forgotten both the wills and the deeds. There were no shares of stock in the box, except some Bullfrog mining stock. There was also a little envelope, which shows that I have some more stock on the books of that company." [150]

Both these certificates were thereupon offered and received in evidence on behalf of defendant, the one

(Testimony of Mrs. S. G. Harvey.)

bearing date the 8th day of April, 1908, and the other December 4th, 1906.

The witness then continued: "I had no recollection on the 5th day of December, or on the later day, when I testified that there was any Bullfrog stock in my safe deposit box."

Mr. WHEELER.—"I am about to conclude with the witness. I will ask you the question generally, Mrs. Harvey, have you a clear and accurate memory as to dates and transactions which happened five or six years ago?"

A. "I am afraid I have not, Mr. Wheeler."

Recross-examination.

"On the 26th day of June, 1905, I think I was in San Francisco, but I am not positive. I was here very shortly after, if not at that date, during the first part of July. During the month of June, 1905, I may have been in New York. I do not know on what day I left here for New York. I left New York for San Francisco, I think in the first part of July. I am quite certain that I was here during part of June. I don't know that I returned on July 6th, 1905, but I did return in the early part, the beginning of July. I returned here early in July. I do not know what weeks of June I spent in New York. I think I was in New York in the latter part of June, 1905. I do not know whether I was on the train on the 4th day of July, en route to San Francisco. I went East and came back hurriedly. If I was here in the beginning of July I was in New York on the 26th. I think I was in New York or, on the

(Testimony of Mrs. S. G. Harvey.)

way back on July 4th. In entering these transactions on slips of paper, after I have put them all on one paper, there was no necessity of keeping the slips, and I destroyed them." [151]

[Testimony of Mrs. Ward Barron, for Defendant.]

Mrs. WARD BARRON, a witness called on behalf of the defendant S. G. Harvey, after being duly sworn, testified as follows:

"I am the daughter of Mrs. J. Downey Harvey. During the winter of 1907 I resided with my mother in Monterey. We were there for two or three years at the Hotel Del Monte. During that time I had some conversation with my mother about my father's affairs. In this conversation *mentioned* was made of the shares of stock of the Shore Line Investment Company."

To testimony of this conversation, counsel for plaintiff objected as immaterial, irrelevant and incompetent. The objection was overruled and the witness continued:

"My mother was worried very often about the affairs of the Ocean Shore, and I asked her if she did not have anything of her own that would be very valuable, and she said that she had shares in the Shore Line Investment Company, and those, Mr. Harvey told her, were going to be very valuable some day. This conversation took place in 1907, and several times after that."

Cross-examination.

"On June 26th, 1905, I think my mother was in New York; I was at school at New York and had

(Testimony of Mrs. Ward Barron.)

graduated. My mother was there to take me out of school and take me home in June, 1905."

Redirect Examination.

"We arrived in California early in July, according to my recollection, my mother having come to bring me home."

**[Testimony of Robert Finn, for Defendants
(Recalled—Cross-examination).]**

ROBERT FINN, recalled for further cross-examination, testified:

"I have examined the books which were offered in evidence [152] for the month of May, 1905, in which month Mrs. Harvey made a change from one safe to another. Our books do not show that she visited either safe at the time she made the change. Mrs. Harvey had only one safe deposit box there at a time. In the month of May, she changed from one box to another, but that record does not show that she was present at the safe deposit vaults at any time in the month of May. It is from a registration card that I knew that Mrs. Harvey was there when she made the change, but there is no record on the books."

**[Testimony of Charles W. Fay, for Defendants
(Recalled).]**

CHARLES W. FAY, recalled in response to a question by the Court, testified:

When Mr. Harvey gave me those certificates, as I previously testified, they bore his endorsement on the back. The earliest date that I saw these certifi-

(Testimony of Charles W. Fay.)

cates was the latter part of October or the first part of November, 1909. They were not endorsed to Mrs. Harvey, but simply in blank, as I recall them.

The defendants here rested.

[Order Approving Statement of Evidence on Appeal.]

On stipulation of the parties that the foregoing statement of evidence on appeal is true, complete and properly prepared, the same is hereby approved.

Dated this 30th day of March, 1914.

M. T. DOOLING,

Judge of the District Court of the United States for
the Northern District of California. [153]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate
of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN
DOE, RICHARD ROE and JANE BLACK,
Defendants.

Stipulation to Statement on Appeal.

IT IS HEREBY STIPULATED, by and between B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a bankrupt, plaintiff

and respondent, and S. G. Harvey, defendant and appellant in the above-entitled action, and their respective solicitors, that the foregoing Statement on Appeal, having embodied in it the amendments proposed by the respondent, is true, complete and properly prepared to the satisfaction of the said parties and their respective solicitors undersigned. Notification to the respondent and his solicitors of the lodgment in the Clerk's office of the original statement prepared by appellant, and of naming the time and place when appellant will ask the Court, or Judge, to approve the said statement, are hereby waived.

IT IS FURTHER STIPULATED, that the foregoing statement may be approved by the Court, or a Judge thereof, as provided in Rule 75 of the Rules of Practice in Equity, promulgated by the Supreme Court of the United States, November 4, 1912, subject to such direction as the Court, or a Judge thereof, [154] may give in respect of such approval.

Dated, March 30th, 1914.

BERT SCHLESINGER,

A. E. SHAW,

EDWIN H. WILLIAMS,

Solicitors for Plaintiff and Respondent.

CHARLES S. WHEELER and

JOHN F. BOWIE,

Solicitors for Defendant and Appellant.

[Endorsed]: Filed Mar. 30, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [155]

*In the District Court of the United States, in and
for the Northern District of California, Division
Number One.*

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate
of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN
DOE, RICHARD ROE and JANE BLACK,
Defendants.

**Notice of Having Deposited Stock Certificate in
Accordance With Order Allowing Appeal and
Supersedeas.**

To B. S. Stowe, trustee in Bankruptcy of the Estate
of J. Downey Harvey, a Bankrupt, and to Messrs.
Schlesinger & Shaw and Edwin H. Williams, His
Attorneys:

YOU AND EACH OF YOU WILL PLEASE
TAKE NOTICE, that the defendant in the above-
entitled action, S. G. Harvey, has this day deposited
with the Clerk of the above-entitled Court, Certifi-
cate No. 83 for 546 shares of the capital stock of
Shore Line Investment Company, a corporation, en-
dorsed by her. That the said deposit is made in
compliance with two certain orders this day made by
the above-entitled Court, to wit: An order allowing
an appeal with *supersedeas*, and also an order grant-
ing a writ of error with *supersedeas*.

Dated, this 21st day of November, 1913.

CHARLES WHEELER and
JOHN F. BOWIE,

Attorneys for Def. S. G. Harvey. [156]

Above Certificate No. 83 received this 21st day of
Nov., 1913.

[Seal]

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy.

Receipt of a copy of the within Notice this 21st day
of November, 1913, is hereby admitted.

SCHLESINGER & SHAW,
ED. H. WILLIAMS,

Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 25, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [157]

*In the United States Circuit Court of Appeals for
the Ninth Circuit, Northern District of California.*

B. S. STOWE, Trustee in Bankruptcy of the Estate
of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN
DOE, RICHARD ROE and JANE BLACK,
Defendants.

Stipulation as to Record on Appeal.

Both a writ of error and an appeal on behalf of the

defendant, S. G. Harvey, having been allowed in the above-entitled cause,—

IT IS HEREBY STIPULATED, by and between plaintiff and said defendant and their respective counsel undersigned, that subject to the approval of the above-entitled court, a single transcript may be printed by the Clerk of the District Court, covering the record both on writ of error and on appeal, without duplication as to pleadings or other papers forming a part of the above records.

All rights to make any and every objection to the propriety of said appeal and writ and motions to dismiss the same are reserved.

Dated, this 8th day of December, 1913.

A. E. SHAW,
BERT SCHLESINGER,
SCHLESINGER & SHAW,
EDWIN H. WILLIAMS,
Attorneys for Plaintiff.

CHARLES W. WHEELER, and
JOHN F. BOWIE,

Attorneys for Defendant S. G. Harvey. [158]

[Order on Stipulation as to Record on Appeal.]

It is so ordered by the Court.

WM. W. MORROW,
Judge.

[Endorsed]: Filed Dec. 31, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [159]

**Certificate of Clerk U. S. District Court to Transcript
on Appeal and Writ of Error.**

I, W. B. Maling, Clerk of the District Court of the United States of America, for the Northern District of California, do hereby certify the foregoing 159 pages, numbered from 1 to 159, inclusive, contain a full, true, and correct Transcript of the record and proceedings in the case of B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Plaintiff, vs. J. Downey Harvey, S. G. Harvey et al., Defendants, numbered 15,222, as the same now remain on file and of record in the office of the Clerk of said District Court; said Transcript having been prepared pursuant to and in accordance with the "Amended Praeipe for Transcript on Appeal and Writ of Error" and the instructions of attorneys for defendants and appellants herein, a copy of which said Praeipe is contained in the foregoing Transcript.

I further certify that the costs of preparing and certifying the foregoing Transcript on Appeal and Writ of Error is the sum of Ninety-three Dollars and Eighty Cents (\$93.80), and that the same has been paid to me by the attorney for appellant herein.

Annexed hereto are the original Citations on Appeal and Writ of Error and the Original Writ of Error with the return attached thereto.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court

this 4th day of April, A. D. 1914.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk. [160]

Citation on Appeal (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to B. S. Stowe,
Trustee in Bankruptcy of the Estate of J.
Downey Harvey, a Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 14th day of March, 1914, being within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the District Court of the United States, for the Northern District of California, in the suit numbered 15,222 in the records of the said Court, wherein S. G. Harvey is defendant and appellant, and you are plaintiff and appellee, to show cause, if any there be, why the decree rendered against the said defendant and appellant S. G. Harvey, as in said order allowing appeal and in said decree mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING,
United States District Judge for the Northern Dis-

trict of California, this 14th day of February, 1914.

M. T. DOOLING,

United States District Judge.

Reserving all objections and exceptions receipt of a copy admitted this 16 day of February, 1914.

BERT SCHLESSINGER,

A. E. SHAW,

E. H. WILLIAMS,

Solicitors for B. S. Stowe, Trustee, Plaintiff and Appellee. [161]

[Endorsed]: No. 15,222. In the United States District Court for the Northern District of California, Division No. One. B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Plaintiff, vs. J. Downey Harvey, S. G. Harvey, John Doe, Richard Roe, Jane Black, Defendants. Citation. Original. Filed Feb. 16, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California, Division Number One.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. DOWNEY HARVEY, a Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, S. G. HARVEY, JOHN DOE, RICHARD ROE and JANE BLACK,
Defendants.

Writ of Error (Original).

United States of America,—ss.

The President of the United States to the Honorable
Judge of the District Court of the United States,
for the Northern District of California, Division
Number One, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between S. G. Harvey, plaintiff in error, and B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a bankrupt, defendant in error, a manifest error hath happened to the damage of S. G. Harvey, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected and full and speedy justice be done to the party aforesaid, in this behalf, do command you, if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court [164] of Appeals, for the Ninth Circuit, together with this writ, so that you have the same, at the City and County of San Francisco, State of California, where said Court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct the error what of right, and according to the law and customs of the United States should be done.

WITNESS, the Honorable EDWARD D. WHITE,
Chief Justice of the United States, this 24th day of
November, A. D. 1913.

[Seal]

W. B. MALING,
Clerk of the District Court of the United States, in
and for the Northern District of California.

C. W. Calbreath,
Deputy.

Allowed this 21st day of November, A. D. 1913.

WM. C. VAN FLEET,

Judge. [165]

24th day of November, 1913, is hereby admitted.

SCHLESINGER & SHAW,

EDWIN H. WILLIAMS,

Attorneys for Plaintiff.

[Endorsed]: No. 15,222. In the United States
District Court for the Northern District of California,
Division No. One. B. S. Stowe, Trustee in
Bankruptcy of the Estate of J. Downey Harvey, a
Bankrupt, Plaintiff, vs. J. Downey Harvey, S. G.
Harvey, John Doe, Richard Roe, Jane Black, Defendants.
Writ of Error. Filed Nov. 25, 1913. W. B.
Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Return to Writ of Error.

The Answer of the Judges of the District Court of
United States of America, for the Northern District
of California, to the within Writ of Error.

As within we are commanded, we certify under
the seal of our said District Court, in a certain
schedule to this Writ annexed, the record and all

proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this Writ was on the 25th day of November, A. D. 1913, duly lodged in the case in this Court for the within named defendant in error.

By the Court:

[Seal] W. B. MALING,
Clerk United States District Court Northern District
of California.

By Lyle S. Morris,
Deputy Clerk. [168]

Citation on Writ of Error (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to B. S. Stowe,
Trustee in Bankruptcy of the Estate of J.
Downey Harvey, a Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth District, to be holden at the City and County of San Francisco, in the State of California, on the 14th day of March, 1914, being within thirty days from the date hereof, pursuant to a Writ of Error filed in the clerk's office of the District Court of the United States, in and for the Northern District of California, wherein S. G. Harvey, is the plaintiff in error, and you are the defendant in error,

to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 14th day of February, A. D. 1914.

M. T. DOOLING,
United States District Judge.

Reserving all objections and exceptions, receipt of a copy admitted this 16th day of February, 1914.

BERT SCHLESINGER,
A. E. SHAW,
E. H. WILLIAMS,

Solicitors for B. S. Stowe, Trustee, Defendant in Error. [169]

[Endorsed]: No. 15,222. In the United States District Court for the Northern District of California, Division No. One. B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Plaintiff, vs. J. Downey Harvey, S. G. Harvey, John Doe, Richard Roe, Jane Black, Defendants. Citation. Original. Filed Feb. 16, 1914. W. B. Maling, Clerk: By C. W. Calbreath, Deputy Clerk. [170]

[Endorsed]: No. 2401. United States Circuit Court of Appeals for the Ninth Circuit. S. G. Harvey, Appellant and Plaintiff in Error, vs. B. S. Stowe,

as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Appellee and Defendant in Error. Transcript of Record. Upon Appeal from and Writ of Error to the United States District Court for the Northern District of California, First Division.

Received and filed April 4, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth District.*

S. G. HARVEY,
Appellant and Plaintiff in Error,
vs.

B. S. STOWE, Trustee in Bankruptcy of the Estate
of J. DOWNEY HARVEY, a Bankrupt,
Appellee and Defendant in Error.

**Affidavit for Extension of Time to File Record and
Docket Cause.**

State of California,
City and County of San Francisco,—ss.

Nathan Moran, being first duly sworn, deposes and
says:

That he is an attorney at law duly admitted to
practice in all of the courts of the State of California,
and in the District Court of the United States,
for the Northern District of California. That here-

tofore, on or about the 13th day of March, 1914, affiant made an affidavit for an extension of time to file record and docket the above-entitled cause in this Court, and hereby refers to said affidavit, and by reference incorporates herein the facts and statements there deposed to. That upon said affidavit this Court made an order allowing fifteen (15) days from and after the 14th day of March, 1914, within which to file the record and docket the said cause. That affiant promptly thereafter delivered to the solicitors and attorneys for the appellee and defendant in error, an engrossed copy of the statement of evidence on appeal. That by reason of his engagement in a case pending in the District Court of the United States, the attorney for the appellee and defendant in error having charge of the preparation of said record, was unable to complete his comparison thereof until to-day. That the said statement was this day stipulated to by the attorneys and solicitors for the respective parties, and was approved by a Judge of the District Court of the United States, and was filed in the office of the Clerk of the First Division of the last-mentioned court.

That further time is required by the Clerk of the said last-mentioned Court to prepare the said record. That affiant is informed by the Clerk of the District Court of the United States, and believes that said record can be prepared and filed in the office of the Clerk of this Court, on or before the 4th day of April, 1914, and in time to be assigned for hearing upon the May Calendar of this Court.

WHEREFORE affiant respectfully requests that

an order be made granting five (5) days additional time, from and after this date, to file said record on appeal and on writ of error in this cause, and to docket the said cause.

Further deponent saith not.

NATHAN MORAN.

Subscribed and sworn to before me this 30th day of March, 1914.

[Seal]

ALICE SPENCER,

Notary Public in and for the City and County of San Francisco, State of California.

[Order Extending Time to April 4, 1914, to File Record Thereof and to Docket Cause in Appellate Court.]

Upon reading and filing the foregoing affidavit, and good cause appearing therefor:

IT IS HEREBY ORDERED, that five (5) days from and after the 30th day of March, 1914, be, and the same is, hereby granted for the filing of the record and the docketing of the above-entitled cause on appeal and writ of error.

Dated March 30th, 1914.

WM. W. MORROW,
Judge.

[Endorsed]: No. 15,222. In the United States Circuit Court of Appeals for the Ninth Circuit. S. G. Harvey, Appellant and Pltff. in Error, vs. B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Appellee and Deft. in Error. Affidavit for Extension of Time to File Record and Docket Cause and Order. Filed Mar. 31,

1914. W. B. Maling, Clerk. By ———, Deputy Clerk. Filed Mar. 31, 1914. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

S. G. HARVEY,

Appellant and Plaintiff in Error,

vs.

B. S. STOWE, Trustee in Bankruptcy of the Estate
of J. DOWNEY HARVEY, a Bankrupt,
Appellee and Defendant in Error.

**Affidavit for Extension of Time to File Record and
Docket Cause.**

State of California,

City and County of San Francisco,—ss.

Nathan Moran, being first duly sworn, deposes and
says:

That he is an attorney at law duly admitted to
practice in all of the courts of the State of California,
and in the District Court of the United States,
for the Northern District of California. That he is
associated with, and employed by, Charles S. Wheeler
and John F. Bowie, attorneys and solicitors for S. G.
Harvey, appellant and plaintiff in error in the above-
entitled cause. That an appeal and a Writ of Error
have both been allowed to the said S. G. Harvey, in
said cause, and that affiant has charge of the prepara-
tion of the record on such appeal and Writ of Error,
and is the only person representing the said S. G.
Harvey thoroughly familiar with the condition of
the above-entitled cause, and the records thereof.

That the above-entitled court, upon stipulation of the parties, heretofore made an order allowing the appeal and Writ of Error in said cause to be brought up upon a single record.

That there was prepared, under the direction of affiant, a statement of the evidence on appeal, on behalf of the appellant, and the same was lodged in the office of the Clerk of the District Court of the United States for the Northern District of California, at the time of filing appellant's praecipe, under Rule 75 of Rules of Practice in Equity promulgated by the Supreme Court of the United States. That the appellee, in due time, proposed amendments to the said statement. That affiant was unable to agree with the solicitors of the appellee, upon a settlement and allowance of the said amendments to the said statement of evidence on appeal, until within ten days last past, or thereabouts, owing to the absence from the State of California of the solicitor for the appellee having this matter in charge. That affiant has caused to be prepared an engrossed statement of evidence, embodying the amendments of appellee agreed upon by the respective solicitors for the parties, and the same is now completed with the exception of the incorporation therein of certain exhibits offered in evidence at the hearing of the cause.

That citations were duly issued upon the said appeal and upon the said Writ of Error, and the same are returnable in the above-entitled court, under Rule 16 of the said court, on the 14th day of March, 1914. That for the causes above specified, affiant has been unable to complete the record for filing within the

time permitted under said Rule 16. That affiant verily believes that the said record can be completed and filed with the Clerk of the District Court of the United States, for the Northern District of California, within ten (10) days, or thereabouts from the date hereof. That in order to permit the printing of the same record, which will be somewhat voluminous, an extension of thirty (30) days from the 14th day of March, 1914, within which to file said record on appeal and on Writ of Error in this cause, and to docket the said cause, will not be an unreasonable time, and affiant prays that an order be made granting such extension.

Further deponent saith not.

NATHAN MORAN.

Subscribed and sworn to before me this 13th day of March, 1914.

[Seal]

ALICE SPENCER,

Notary Public in and for the City and County of San Francisco, State of California.

[Order Extending Time to March 29, 1914, to File Record Thereof and to Docket Cause in Appellate Court.]

Upon reading and filing the foregoing affidavit, and good cause appearing therefor:

IT IS HEREBY ORDERED, that fifteen (15) days from and after the 14th day of March, 1914, be, and the same is, hereby granted for the filing of the record and the docketing of the above-entitled cause

on appeal and Writ of Error.

Dated March 13, 1914.

WM. W. MORROW,
Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. *S. G. Harvey*, Appellant and Plaintiff in Error, vs. *B. S. Stowe*, Trustee in Bankruptcy of the Estate of *J. Downey Harvey*, a Bankrupt, Appellee and Defendant in Error. Affidavit and Order for Extension of Time to File Record and Docket Cause. Filed Mar. 13, 1914. F. D. Monckton, Clerk.

No. 2401. United States Circuit Court of Appeals for the Ninth Circuit. Orders Under Rule 16 Enlarging Time to April 4, 1914, to File Record Thereof and to Docket Case. Refiled Apr. 4, 1914. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2401.

S. G. HARVEY, Appellant and Plaintiff in Error,
vs.B. S. STOWE, as Trustee in Bankruptcy of the Estate of J. Downey
Harvey, a Bankrupt, Appellee and Defendant in Error.Upon Appeal from and Writ of Error to the United States District
Court for the Northern District of California, First Division.*Proceedings Had in the United States Circuit Court of Appeals for
the Ninth Circuit.*Index to Proceedings Had in the United States Circuit Court of
Appeals for the Ninth Circuit.

No. 2401.

S. G. HARVEY, Appellant and Plaintiff in Error,
vs.B. S. STOWE, as Trustee in Bankruptcy of the Estate of J. Downey
Harvey, a Bankrupt, Appellee and Defendant in Error.

Page.

At a stated term, to-wit: the October term, A. D. 1913, of the United
States Circuit Court of Appeals for the Ninth Circuit, held in the
court-room thereof, in the City and County of San Francisco, in
the State of California, on Thursday, the twenty-eighth day of
May, in the year of our Lord one thousand nine hundred and
fourteen.

Present:

Honorable William B. Gilbert, Circuit Judge, Presiding.

Honorable Charles E. Wolverton, District Judge.

Honorable William C. Van Fleet, District Judge.

No. 2401.

S. G. HARVEY, Appellant and Plaintiff in Error,
vs.R. S. STOWE, as Trustee in Bankruptcy of the Estate of J. Downey
Harvey, a Bankrupt, Appellee and Defendant in Error.*Order of Submission.*Ordered, above-entitled cause on appeal and on writ of error argued
by Mr. Charles S. Wheeler, counsel for the appellant and plaintiff

in error, and by Mr. Bert Schlesinger, counsel for the appellee and defendant in error, and submitted to the Court for consideration and decision.

At a stated term, to-wit: the October term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the eighteenth day of November, in the year of our Lord one thousand nine hundred and fourteen.

Present:

Honorable William B. Gilbert, Circuit Judge, Presiding.
 Honorable Erskine M. Ross, Circuit Judge.
 Honorable Charles E. Wolverton, District Judge.
 The Clerk and the Crier.

No. 2401.

S. G. HARVEY, Appellant and Plaintiff in Error,

vs.

B. S. STOWE, as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Appellee and Defendant in Error.

Order Directing Filing of Opinion and Filing and Recording of Decree.

Ordered that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the clerk, and that a decree be filed, and recorded in the Minutes of this Court, in said cause in accordance with said opinion.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2401.

S. G. HARVEY, Appellant and Plaintiff in Error,

vs.

B. S. STOWE, as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Appellee and Defendant in Error.

[Opinion U. S. Circuit Court of Appeals.]

Upon Appeal from and Writ of Error to the United States District Court for the Northern District of California.

Charles S. Wheeler and John F. Bowie, for Appellant and Plaintiff in Error.

Bert Schlesinger, E. H. Williams, and A. E. Shaw, for Appellee and Defendant in Error.

Before Gilbert, Circuit Judge, and Wolverton and Van Fleet,
District Judges.

WOLVERTON, District Judge:

J. Downey Harvey, having been adjudged a bankrupt by involuntary proceedings, B. S. Stowe was, on November 17, 1911, duly elected trustee of his estate, and subsequently qualified as such. On January 11, 1912, the trustee instituted a suit in equity against Harvey and S. G. Harvey, his wife, to set aside a transfer previously made by Harvey to his wife of 546 shares of the capital stock of the Shore Line Investment Company, claiming said stock to be an asset of Harvey's estate.

The complaint avers that Harvey gave the stock to his wife on the 26th day of November, 1909, and at the time was insolvent, and, that the gift was without consideration, fraudulent, and inoperative as to his creditors.

Mrs. Harvey answers denying that a gift was made to her of the stock on the date stated, but affirms that Harvey in consideration of natural love and affection gave her 300 shares of such stock on or about June 26, 1905, 66 shares on or about August 29, 1905, and the remaining 180 shares on or about September 25, 1905, and endorsed and delivered to her the certificates representing such shares, when the gift thereof was made; that at the time stated Harvey was solvent and able to pay his debts from his own means, and that his assets taken at a fair valuation were sufficient in amount to pay his just debts and liabilities.

That Harvey was wholly solvent during the year 1905 and for two years or more thereafter there can be no dispute, and that he was insolvent on November 26, 1909 is admitted.

Harvey being the common source of title and his wife deraigning title from him, if she has any, has the burden of establishing title in herself. This depends upon whether the gift of the stock was made to her, as she alleges, and at the time or approximately the time stated, and upon the good faith attending the transaction. If the stock was given or transferred at the time as averred by plaintiff then it is utterly without legal effect and void as to the creditors of Harvey's estate.

The Shore Line Investment Company was organized in May or June, 1905. J. Downey Harvey was chosen one of its directors, and on January 3, 1906, he was also elected president, and since held these positions up to the time he became a bankrupt. Prior to the incorporation of this company Harvey testifies that he in company with his wife and others visited certain lands which were to become the property of the corporation, and its principal holdings, and continuing he says:

"I told her at that time that I was going to give her my stock that I would acquire in that land company. After the acquisition of the land, and the organization of the company, the stock was issued to me in June, 1905, one lot, another lot in August, 1905, and two lots in September, 1905. Stock certificates were issued to me

and when I received them I endorsed them and gave them to Mrs. Harvey in conformity to what I told her I was going to do. I took them and handed them to her and told her that they were the certificates of the Shore Line Investment Company that she was interested in as I had promised her, and I told her to keep them and take care of them, that they were of value and that they were endorsed. And I said to her that the reason I am retaining them in my name is that I am very largely interested in the Ocean Shore Railroad, and these two companies are associated in the development of one another, one depends upon the success of the other. If I keep this stock in my name, which I will want to do, I will show the people that the Ocean Shore Railroad is interested in the success of this land company, and that I am a large holder in it, and that at all times I will be ready to help out the Granada as much as we can.

* * * * *

"In April, 1907 I paid a \$10 assessment on that stock. I had no conversation with Mrs. Harvey in regard to the assessment. Mrs. Harvey was East with one of my daughters and I wrote her the assessment had been levied and that when she returned I would get the stock and have the receipt entered on it. When she returned I did get the stock. I did not say anything to her regarding whether or not I would pay the assessment. When I gave her the stock no assessment was contemplated, and I naturally felt that since I had given her a gift at that time, I ought to follow it up and pay the obligations that would fall on it. I did pay the assessment and wrote her to that effect to New York when she was there. My intent in paying the assessment was to make an additional gift which would naturally follow this present of stock. I told her if I acquired more stock I would give it to her, and I felt it my duty to take care of the assessment and make a gift of it as I had of the certificates themselves. The total paid by me for the stock, including the assessment was \$23,000 and some odd dollars, I think \$650, or something like that."

The stock as Harvey affirms was held in her possession ever since, except at one time, at his request, she delivered to him a block of 66 shares which he had put in the name of one J. A. Folger in order to qualify him to act as a director of the company. As to this he says:

"It was in December, 1906, that I first got this stock from Mrs. Harvey. It was transferred from my name unto that of J. A. Folger, where it remained until December, 1907, when it was re-transferred into my name and was endorsed and delivered to Mrs. Harvey by me. Mrs. Harvey had Mr. Folger's certificate endorsed by him. The transfers were attended to by me. I got the certificate on each occasion from Mrs. Harvey and took it to the secretary and returned it to her. There was no other transfer of this stock between the time that I gave it to Mrs. Harvey and its actual transfer in November, 1909. At that time I had the stock in my possession, that is, I did not have it in my possession except for that purpose."

And at another time, when the company was negotiating for a loan being early in November, 1909, it was contemplated that the

stockholders would be required to sign an agreement pledging themselves with their stock to meet the obligations. Of this Harvey testifies:

"I was then notified by the General Manager, that it would be necessary for me to produce these certificates of stock, as he wanted to see how much stock he could acquire for this purpose. * * * I got the stock from Mrs. Harvey and turned it over to Mr. Fay, General Manager of the Shore Line Investment Company, who was negotiating for the loan. * * * I gave this stock to Mr. Fay. They were in my name, but had my endorsement on them. I received them back from Mr. Fay around the 26th of November, or a little before. As negotiations were still going on, and the same obligation would be insisted upon by any bank making a loan, I had the stock transferred to Mrs. Harvey's name.

"I receipted for the stock, but Mr. Corbet said, 'I will have to have Mrs. Harvey's receipt. I will give you a receipt.' He dictated one to his stenographer which he handed to me and which I took or sent to Mrs. Harvey. This was returned to me and the certificates were given to Mrs. Harvey later. The negotiations for the loans kept up until some time in December. On December 9th we levied an assessment. We did not make the loan, because our payments commenced to come in and we were able to discharge our obligation and collect sufficient money to satisfy our creditors. It was while these negotiations were pending that I had the stock transferred to Mrs. Harvey's name. At the conclusion of the negotiations I sent the stock to Mrs. Harvey. I either sent the stock to Mrs. Harvey, or took it down to her myself to Del Monte. I have never had the certificates in my possession except as I have testified here, from the time they were first delivered until this action was commenced."

On cross-examination Harvey further said:

"The reason that I did not have these shares of stock transferred to Mrs. Harvey in 1905 was, as I have testified, that we had just formed these two companies, and the Shore Line Investment Company depended upon the building of the Ocean Shore Railroad. I was the largest stockholder in both companies, and thought that my association and prominence would help the Shore Line Investment Company. There was a great deal of rivalry down that way as to this land business, and if we could make an association between the two, it would make the people who purchased at Granada feel that they were going to get a good railroad service, and if there was any favoritism or help to be had from the association with the railroad, we wanted to get it. If I was not connected with the Shore Line Investment Company, its position would be just the same as the other companies not associated with the railroad. * * * It afterwards turned out to be of immense benefit that I retained my identity as a stockholder in the Shore Line Investment Company. As a matter of fact the men who furnished the money to build the Ocean Shore Railway Company put up the money to finance the Shore Line Investment Company.

"There was a close connection between the two companies through the people who formed them. There was no money connection

between the two companies. The original stockholders were the same."

Mrs. Harvey first gave her testimony before the Referee in Bankruptcy. On the subject of the gift she says:

"In 1905 Mr. Harvey told me he was going to give me some stock in the Shore Line Investment Company and he gave me in June of that year 300 shares. He told me as he acquired more he would give it to me. The reason that he kept the shares in his own name was because he was a big holder in the Ocean Shore Railway Company and that would show his interest in the Shore Line Investment Company if he kept them in his name. In August he gave me 66 shares. In September he gave me 160 shares and 20 shares, and I put them in my box. In 1906 Mr. Harvey asked me for the certificate for 66 shares in order to make Mr. Folger a director of the company. In 1907, Mr. Harvey wrote me. I was then in New York, there was an assessment on the Shore Line Investment Company of \$10 which he paid and when I returned in July I gave him the certificates and he had the assessments endorsed on them. In December Mr. Folger went out of the directorship of the Shore Line Investment Company and I got the certificate endorsed by Mr. Folger and gave it to Mr. Harvey. He gave me another one endorsed by himself and I put it in my box. Mr. Harvey gave me the stock in the respective months that I have named in 1905; I mean by that he gave me the certificates, and they were endorsed by Mr. Harvey. I put the certificates in the safe deposit of the First National Bank, where I always have a box. I remember the dates on which these certificates were given me, because I put them down on a memorandum.

* * * * *

"In December, 1906, Mr. Harvey stated he wanted the stock certificate for 66 shares to make Mr. Folger a director. I went to my box and got the certificate and gave it to Mr. Harvey. I received it back again endorsed by Mr. Folger's name and put it in my box.

* * * * *

"As a matter of fact, I delivered all those shares of stock according to Mr. Harvey's directions. There was not much direction given me, but I was at all times willing to act in accordance with his suggestion. I never repaid Mr. Harvey the amount he advanced for assessments, because he never asked me. He said it was a gift along with the others. I never had any discussion with Mr. Fay in regard to the Shore Line Investment Company. Never spoke to him about it in my life. Mr. Harvey told me Mr. Fay was to manage at Granada. He never told me anything else about him. Mr. Harvey never asked me for possession of my stock so that he could deliver it to Mr. Fay. He never asked for the possession of the stock at any time except for Mr. Folger, and except that in 1909 he asked me for the stock again because there was a second assessment.

"Mr. Harvey told me that since I was the owner of the stock the bank absolutely demanded that I should sign the note. He said that since I was the owner and holder of the stock he deemed it advisable to have it put in my name, and therefore he had it put in my name.

Up to that time he had always appeared on the books of the corporation as a stockholder. I always knew that the stock stood in Mr. Harvey's name on the books of the corporation and was familiar with the fact that he was acting as president of the company and was managing its affairs. I was cognizant of the fact that there had been an assessment on the stock, but never made any offer to return that money to him."

This testimony was given on or prior to December 19, 1911. On January 5, 1912 she went on the stand again and testified in effect that she kept a safe deposit box at the First National Bank during the year 1905 and up until 1910, but that she had a safe of her own, with a combination lock which she kept at her home at 2555 Webster Street, San Francisco, California, and that she kept the stock in that safe and not in the safe deposit box at the bank, as she first stated. She changed safes in 1907, but always had a safe of her own and kept the stock in there. As to this she says:

"I did not have any shares of stock of the Shore Line Investment Company in that box during the year 1905. I made a mistake in my testimony, that is the reason I want to correct it. I never had any shares of stock of the Shore Line Investment Company in my box at any time. I kept that stock in my safe."

And further on she continues:

"On thinking it over I kept this stock in my own safe in my house."

In this relation it is of interest to note that Mrs. Harvey at the instance of one of her attorneys wrote a letter of date, December 19, 1911, to E. H. Williams, Esq., attorney for plaintiff, which was delivered to him by her husband under the following circumstances: One J. K. Moffitt was on the witness-stand and when Mr. Williams began to question him in regard to the records of Mrs. Harvey's visits to the safe deposit vaults Harvey handed the letter to Williams. She states in the letter among other things: "I do not myself know the exact dates of my visits (to the safe deposit box). I have of course been there a number of times since 1905; but I have at all times had a safe of my own wherever I have been living, whether here or at Monterey, and I kept many of my papers in these safes, and as I think it over I am positive I kept my certificates of stock there instead of in my safe deposit box. * * * Should you, or Commissioner Kreft wish me to correct my testimony in these particulars I will of course do so gladly." The letter was offered in evidence by plaintiff while Mrs. Harvey was on the witness-stand.

This in brief is the substance of Mr. and Mrs. Harvey's testimony touching the alleged gift of this stock by Harvey to his wife in the year 1905, and with it, considering the corroborating and discrediting testimony otherwise adduced, Mrs. Harvey's title must stand or fall.

In this relation we may pause to consider the point made by appellee that the alleged gift is in contravention of Section 3440 of the Civil Code of the State of California, which provides that every transfer of personal property, with certain exceptions, is conclusively pre-

sumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void against those who are his creditors while he remains in possession, and the successors in interest, of such creditors. This statute received early construction by the Supreme Court of California in *Stevens v. Irwin*, 15 Cal. 503. At page 506 the Court says:

"A reasonable construction must be given to this language, in analogy to the doctrines of the courts holding the general principles transcribed into the statute. The delivery must be made of the property; the vendee must take the *actual* possession; that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous—not taken to be surrendered back again—not formal, but substantial. But it need not necessarily continue indefinitely, when it is bona fide and openly taken, and is kept for such a length of time as to give general advertisement to the status of the property and the claim to it by the vendee."

This construction, as we understand, has been uniformly adhered to by that Court.

Bunting v. Saltz, 84 Cal. 168;

Murphy v. Mulgrew, 102 Cal. 547;

McKee Stair Building Co. v. Martin, 126 Cal. 557;

Sequeira v. Collins, 153 Cal. 426.

Registration of a transfer of the stock upon the books of the corporation is not essential to a valid transfer of the title, and this even though the certificate recites that it is transferable only on the books of the company and a surrender of the stock. *Nat. Bank of the Pacific v. Western Pacific Ry. Co.*, 157 Cal. 573. In view of this holding, if the testimony of Mr. and Mrs. Harvey is to be credited, there was a complete and actual transfer by endorsement and delivery of this stock by the donor to the donee, and the donee has continued in the sole possession and dominion thereof with the two exceptions noted, which, in our judgment, does not break the continuity and good title vested in the donee. This, as we say, would be so if the parties to the transaction are to be credited. Of this we will now inquire.

It will conduce to the clarity of the situation by considering those things and the testimony attending them which go to the corroboration of the testimony of Harvey and wife separately from those that tend to discredit such testimony, or to a disparagement of Mrs. Harvey's title.

Mr. Burke Corbet, who was secretary of the Shore Line Investment Company and held the office since the company's organization, testifies that prior to the issuance of any stock to Harvey he had a discussion with Harvey as to how his stock should be issued, he then

having indicated that he was buying the stock for his wife. "I suggested," says the witness, "to him then that if this was true the stock should be issued in Mrs. Harvey's name. Mr. Harvey said that he preferred to have it issued in his own name because he wanted to be a director of the corporation, and wanted to participate actively in the management of the corporation. I told him at that time, and at a number of other times when subsequent stock certificates were issued in his name, that I thought the stock ought to be issued in the name of Mrs. Harvey, if she was the owner of the stock, and advised him at different times to that effect. At all of those times before any stock was ever issued in the name of Mr. Harvey, he stated to me that he had given the stock to Mrs. Harvey. After the stock was issued, we discussed it a number of times, and he told me he had given it to Mrs. Harvey."

Corbet further testifies that from the first to the last Harvey owned upon the books of the company 556 shares in all. The additional certificates for 10 shares went into his name on the books on June 1, 1909.

On April 13, 1907 an assessment was paid by Harvey upon the 546 shares of stock and appears upon Harvey's private books in this language: "April 13, 1907, to cash assessment No. 1, 546 shares at 10, \$5,460."

As to this Mr. Wasserman, who was Harvey's bookkeeper from 1896 to the middle of 1908, testifies:

"At the time the assessment of the stock was paid,—I do not know the exact date, but it would show in the book,—I remember distinctly about asking Mr. Harvey about a receipt or entry for that assessment, and he told me that Mrs. Harvey—she, I think, was away at the time—that when she came back he would have the receipt entered on the stock. It was my habit when Mr. Harvey paid an assessment, to have the receipt entered on the back of the stock. Mr. Harvey told me that Mrs. Harvey had possession of the stock at this time when the assessment was paid. This date was April 13, 1907. I made the entry on page 44 of Mr. Harvey's ledger showing the payment of the assessment."

Witness further testifies that during the time that he was in Harvey's employ he had full access to all compartments of his safe wherein he kept his stocks and bonds, save one which was held by a friend of his, and went frequently to Harvey's safe deposit box, and during each year checked up his securities in the box; and that at the time of the San Francisco fire he went to his office, opened the safe and gathered up all their securities that he thought were valuable, and took them to Harvey's home. One block of papers he carried around for some time in a wallet, being the same within which Harvey had his securities, insurance policies and other valuable papers, and that he never saw any stock of the Shore Line Investment Company in his custody, either in his office safe, in his safe deposit box, or at the time he took the securities to his home.

James W. Crosby, who was Harvey's bookkeeper from the spring of 1908, as he says, up to the time at which his testimony was given, testifies concerning Assessment No. 1, alluded to by Wasserman,

which appears on the books of Harvey as paid April 13, 1907, that at the time he was auditor and assistant secretary of the Shore Line Investment Company, and had a conversation with Harvey as follows:

"I do not remember the exact conversation, but he brought me a check in payment of the assessment. He told me at that time that it was to pay the assessment on Mrs. Harvey's stock, that Mrs. Harvey was away at the time and consequently he could not get the certificates, but he would bring them to me later to have the notation 'assessment paid' stamped or written on the back of the certificate. This was done at a later day. I do not recall how long afterwards. I do not recall Mr. Harvey's wording, but I understood that the stock belonged to Mrs. Harvey. I do not know whether he said the stock belonged to Mrs. Harvey in so many words or not. He told me the stock was Mrs. Harvey's at that time."

Mr. Charles W. Fay, who has held the position of general manager of the Shore Line Investment Company since January, 1906, testifies:

"I met Mr. Harvey very frequently. My business called me into consultation with him constantly, almost every day, and about that time he informed me——

(Interrupted by objection.)

—Mr. Harvey told me at that time that this stock was Mrs. Harvey's. This was in 1906. I recall the circumstance of a negotiation with reference to paying off some indebtedness of the Shore Line Investment Company, in 1909. As General Manager of the Shore Line Investment Company, I was authorized to negotiate for a loan to clean up this indebtedness. I negotiated with a certain banking institution here, and one of the conditions was that the stock of the various stockholders, or at least 90 per cent of them was called for, for the purpose of securing this loan. Also, that an agreement should be signed by the owners of the stock, holding themselves proportionately liable for the amount to be borrowed. I called on Mr. Harvey and asked him for the stock held in his name in this company, explaining my purpose. He said he would get the stock; that it was Mrs. Harvey's stock. I asked him how long it would be, and he said he would have to send for it; I believe that Mrs. Harvey was then at Del Monte. Two or three days subsequently I called on him and he gave me the certificates of stock standing in his name, endorsed. They did not remain so very long in my possession. I was collecting it for the trustee who was to hold the stock. I judge that it was either in my possession, or in his, for probably thirty days. The negotiations did not go through, and subsequent to that time there was an assessment levied on account of the demand of the French Bank for a payment on their loan. I gave the stock, I think, to Mr. Guggenheim, who was to hold this and the other stock. I do not recall whether I returned it to Mr. Harvey, or whether he got it back from Mr. Guggenheim direct."

Continuing on cross-examination he further states:

"I first had physical possession of these shares of stock in October or November, 1909. I received them from Mr. Harvey."

Now, on the other hand, we may advert to such testimony as seems to be in disparagement of Mrs. Harvey's title, or that has a tendency to refute the testimony adduced in support thereof.

Harvey kept a set of private books, wherein were contained accounts of his private affairs, among which are to be found memoranda under the head, Family Gifts and Allowances. His individual account shows from the first, that is, from the date of the purchase of these shares of stock, until March 31, 1910, that they were posted to his credit, and not charged to Family Gifts and Allowances. The entries with reference to the stock are beneath the numerals 1905, and are as follows, having allusion no doubt to the time of purchase:

"June 20.	To Cash.....	\$7,500.00
Aug. 22.	To cash Fentin interest, B. Corbet.....	1,000.00
Aug. 24.	To cash Fentin interest, A. D. Bowen....	650.00
Sep. 22.	To cash 170 shares at 50.....	8,500.00
Sep. 26.	To cash 10 shares at \$50.....	500.00
Total.....		\$18,150.00"

Then, as Wasserman says, for bookkeeping purposes this balance was brought down under date January 1, 1907. Then follows the entry: "April 13, 1907, to cash assessment No. 1, 546 shares at 10, \$5,460," which amount added to the above balance aggregates \$23,610.

Subsequently, under date of March 31, 1910, and under the heading, Family Gifts and Allowances, appears this entry in the journal: "To Shore Line Investment Company \$23,610, transfer to Mrs. S. G. H. of S. L. stock. J. D. H. states this stock was originally purchased for Mrs. H."

Crosby says:

"I made this entire entry at my own volition and not at the request of any person, but in accordance with the facts of which I was cognizant. It was about the time that Mr. Harvey's bankruptcy proceedings were pending, and he asked me to make up a statement for him during the time I kept his books;" and "was made" as he further states, "to wipe the amount off his books in accordance with a statement or request made some time before, that I make a notation at the head of the account in the ledger covering the stock of the Shore Line Investment Company, that the stock did not belong to him. * * * He instructed me prior to March, 1910, to make an entry of this gift to Mrs. Harvey."

Wasserman testifies that at page 162, we take it that this is the ledger, under the caption, Family Gifts and Allowances, appears this entry: "March 31, 1910, S. L. I. stock, \$23,610," the caption being in witness's handwriting, and Crosby testifies: "I made the entry on page 44 of Mr. Harvey's ledger reading, 'March 31st, 1910, F. G. & A. (meaning, Family Gifts and Allowances) 546 shares, \$23,610.'"

Harvey's trial balance book, made up by his bookkeeper, shows that in February, November and December of 1906, and on February 1, 1907, the balance as to this stock standing to his account was \$18,150, and that on February 29, 1908 it was \$23,610. This latter balance manifestly includes the assessment No. 1 of \$5,460, although that item appears to be posted of date April 13, 1907. As to subsequent entries touching the account Crosby, who seems to have made them, says:

"I entered in this trial balance book, referring to ledger folio 44, Shore Line Investment Company's stock, under date of October 31st, 1909, on the debit side, \$26,110, and under date of March 31st, 1910, in the debit column of the same ledger folio and heading I entered \$2,500. The trial balance of October 31st, 1909, was the first that I took; the sum of \$26,110 was the balance shown in the ledger prior to the time that I made the entry transferring Mrs. Harvey's stock to the Family Gifts and Allowance account; the balance for \$2,500 was the amount appearing in the ledger representing stock which Mr. Harvey himself owned."

This \$2,500 item represented 10 shares of stock which went into his name on the books of the company June 1, 1909. These specific shares have gone into the hands of the trustee in bankruptcy.

In Harvey's cash book, under date of September 9, 1905, appears in the handwriting of Harvey a pencil memorandum opposite the words "Shore Line Investment Company," "Property of S. H. H." A like memorandum appears on each of pages 27, 35 and 41 of the cash book. Also another memorandum from the cash book under date September 23, 1905, wherein the words "Property of S. G. Harvey" appear written after the designation, "Shore Line Investment Company," also in the handwriting of Harvey, was introduced.

As further illustrative of entries under the heading, Family Gifts and Allowances, we have the following:

"1907, January 11.	To cash, Mrs. Harvey	\$200.00
January 28.	To cash, Mrs. Harvey	300.00
February 21.	To cash, Mrs. Harvey, O. S. Assessment No. 3.	500.00"

"O. S." meaning: "Ocean Shore Railway Company."

On September 22, 1907, manifestly at the instance of Harvey, Wasserman made up a statement of his affairs giving his liabilities and monthly interest charges; also his monthly income, as well as a list of his properties and assets, showing his liabilities to be \$745,944.37, and his assets, \$1,383,287.47. Following a long list of properties aggregating in estimated value \$993,394.30, appears this statement: "Besides the above, you should take into consideration the following:

Due from Rogers for three assessments paid Ocean Shore	
Stock secured by stocks and bonds.....	\$13,420.00
Ocean Shore Rwy. Co.—Cash put in not including assessment No. 3.....	283,613.17
Ocean Shore bonds given in payment Assessment No. 3.....	55,000.00
Shore Line Inv. Co.....	23,610.00

The letter advised careful study of the statement with a view to disposing of such of the assets as Harvey might be able to, and paying off the debts as fast as possible.

From Corbet's testimony it further appears that on December 20, 1906, Certificate No. 30 for 66 shares of the Shore Line Investment Company's stock was surrendered and cancelled and on the same date a certificate for the same number of shares was issued to J. A. Folger. This was part of the 546 shares in controversy. These shares remained in Folger's name until December 19, 1907, when a new certificate, No. 70, was issued to J. Downey Harvey for the same number of shares.

Another item of testimony which may be mentioned is the memorandum made by Mrs. Harvey, and which was given in evidence purporting to give the date when received and number of shares of stock given her by her husband. It is as follows:

"300 shares delivered June 26th, 1905;
On August 22, 1905, received 40 shares;
On August 22, 1905, received 26 shares;
On September 22, 1905, received 180 shares."

This memorandum was made up from slips which the witness says were made at the time, as was her custom, on the receipt of gifts, and was made up in response to a request of the court, the witness further saying, "At that time I used the slips I spoke of, afterwards destroying them." Further, the witness says in another place, that in making up the slips on receipt of the certificates, "I took the dates of the certificates and not the dates of their receipt."

Further, the testimony tends to show that Mrs. Harvey was in New York City about the date of June 26, 1905, and did not return until early in July, and that there were three admissions to her safe deposit box between June 1, 1905 and December 31st of the same year, which was in each instance by Lizzie Anderson, Mrs. Harvey's maid, namely, July 15, July 17, and November 8th, 1905.

It is important to keep in mind what was done by Harvey in making the alleged gift to his wife. He, according to his own testimony, and that of Mrs. Harvey, endorsed his name upon the certificates of stock and handed them to her. But at the same time the stock was retained in his own name upon the stock books of the company and so carried the entire time up until November 26, 1909, when they were regularly transferred to her on such books, and a certificate was issued to her direct. Harvey's reason for so retaining the stock in his own name upon the stock books was that the success of the Shore Line Investment Company was dependent in large measure upon the building of the Ocean Shore Railroad, and he being the

largest stockholder in both companies, thought his association and prominence in each company would serve to help the other. But the possession of the stock certificate with the endorsement of Harvey's name thereon showing transfer of title, according to the testimony of Harvey and wife, passed to Mrs. Harvey about the date of the certificates. That Harvey intended giving this stock to his wife and that he had given it to her is shown by the evidence of reliable witnesses other than the parties interested. According to Mr. Corbet, Harvey told him at the time he was buying the stock that he was giving it to Mrs. Harvey, and then came up a discussion and suggestions as to how the stock should be issued. But Harvey preferred that it should be issued in his own name, because, as Corbet says, Harvey wanted to be a director of the corporation and to participate actively in its management. Wasserman, Harvey's bookkeeper for many years, has a distinct recollection that Harvey mentioned to him at some time that this stock was Mrs. Harvey's property. This is in relation to a receipt or entry for the assessment paid by Harvey, when Harvey told him that Mrs. Harvey was away at the time "and that when she came back he would have the receipt entered on the stock." Crosby, who became Harvey's book-keeper later sometime in 1908, says he was given to understand by Harvey that the stock belonged to Mrs. Harvey. He, Harvey, directed that certain entries be made in his books concerning such stock, which entries were accordingly made. But a significant transaction occurred prior to the time that Crosby became Harvey's bookkeeper, and while he was Assistant Secretary of the Shore Line Investment Company, which had relation to the payment by Harvey of Assessment No. 1 upon this stock. About the 13th of April, 1907, Crosby asked for the stock so that he might endorse the payment thereon, and Harvey told him then that the stock belonged to Mrs. Harvey, and that she was away at the time, but that he would get the certificates from her and bring them in and have the endorsement made. This was done later. Then Mr. Fay who became manager of the corporation at the same time that Harvey became president says that Harvey told him at the time, in 1906, that the stock was Mrs. Harvey's. A subsequent transaction tends strongly to substantiate Fay's statement, for when he wanted Harvey to put the stock into third hands for the purpose of security, Harvey was unable to produce it until he obtained the same from his wife.

The testimony of these witnesses as it relates to what Harvey said about the stock can hardly be considered to be self-serving, for the statements he made to Corbet and Fay were at about or prior to the time that he delivered the stock to his wife, and evinced his purpose in that respect. *First Nat. Bank v. Holland*, 39 S. E. 126, 128. And what he said to Wasserman, Crosby and Fay when it was desired that the stock be produced in the one case for endorsement of the assessment thereon, and in the other for placing the certificates in the hands of a third party for security purposes was relevant and pertinent as it related to a specific transaction when the presence or production of the stock certificates was required.

But Wasserman's testimony to the effect that he had full access to the depositaries where Harvey kept his stocks and bonds and secu-

ties of all kinds, and that he gathered together his papers and effects after the fire, and that he saw nothing of these stocks in all the time is very significant, as its strong tendency is to establish the pertinent fact that Harvey did not, during the time that Wasserman was his bookkeeper, have this stock in his possession.

The fact as the testimony shows that Harvey procured from his wife 66 shares of this stock, had a certificate issued to Folger for the same, had the same endorsed by Folger and returned to his wife, and afterwards had the stock transferred on the books to his own name, and then returned that stock, with his name endorsed on the certificate again to his wife, is but in keeping with his declaration from the first that he desired that the stock remain in his name on the books of the company, and is in harmony with what was done and designed to be done in the first instance. So of his procuring the stock from his wife at the instance of Mr. Fay for the purpose of using it for security purposes, and so also of his voting and signing the stock at stockholders' and directors' meetings of the corporation.

Concededly it is a strong circumstance against Mr. and Mrs. Harvey's claim that Harvey should have carried this stock on his private books as if it were his own, and so of the assessment No. 1, as if it had been paid by him individually and for his own account and not for the account of Mrs. Harvey. We place no stress on the fact that Harvey made certain entries in his books in pencil indicating that the stock belonged to Mrs. Harvey. These are self-serving. It is true that manifestly his books were not scientifically kept, and it is sought to cast reflection upon his bookkeepers for the manner in which the stock account was so posted and carried as an asset of Harvey. But the bookkeepers were the agents of Harvey, and he must be chargeable with their delinquencies where not accompanied with fraud against him; and, further, he is presumed to know what is in his own books.

There are other entries in his books, however, relating to "Family Gifts and Allowances" account which would seem to indicate that there might have been a mistake on his part or that of his bookkeeper in not posting the stock to the account of Family Gifts and Allowances, or that it was not considered of particular importance that it should have been so posted. The stock was transferred to Mrs. Harvey on the books of the company on November 26, 1909. All are agreed as to this. Yet it is a fact that the asset was not transferred on Harvey's books, or charged to Family Gifts and Allowances until March 31, 1910. Then again, Harvey made a gift to Mrs. Harvey of a lot on Pacific Avenue on February 28, 1905, at which date the deed was actually made to Mrs. Harvey, but the lot was carried on Harvey's books as his asset until July 31, 1905, and was not dropped from the trial balance book until December, 1905.

The letter of Wasserman adds emphasis only to the supposed fact that Harvey knew that the stock was being carried on his books as his individual asset. Another thing which seems to militate against the accuracy of Mrs. Harvey's testimony is the fact that she first testified that she kept this stock in her safe deposit box at the First National Bank. She so stated positively and unequivocally. But later

she changed her testimony and affirmed that the stock was kept in her own private safe at her residence or where she lived elsewhere. This was a matter about which she may have made a candid mistake. Women are usually not so careful in business dealings as men, and ordinarily do not keep a strict trace of their business affairs as men do. And it might well be that Mrs. Harvey made her private safe the depository of these bonds. Again the memorandum of Mrs. Harvey touching the time when she received this stock seems to discredit her, but she explains by saying she used the date of the certificates rather than the actual date when she received the stock in making the record, and this reconciles the receipt of the first 300 shares with the fact that she was probably away in New York on the date of its issue. The memorandum which was put in evidence was made up in response to the request of the court. She then destroyed the original slips.

Now, upon this record what are we to say is the fact as to whether Harvey gave this stock to his wife? Harvey affirms that he endorsed and delivered the stock with the intent and purpose of giving it to her, and Mrs. Harvey affirms that he did not only endorse and deliver the stock to her, but that she received it and accepted the same as a gift, and that she has continued in the actual possession and dominion ever since. As we have indicated the retaining of the stock in Harvey's name upon the stock books of the company was in harmony with his primary purpose so that he could continue as a director of the corporation. This casts no discredit upon his statement touching what was done in making the gift; and while the stock was carried upon his private books as an asset of his own, we think does not destroy the verity of his statement respecting the initial fact of endorsing and delivering the stock as a gift to her. We are still bound to believe what he said as to that, and what his wife said as to it. The manner in which he carried the stock on his private books tends, undoubtedly, to an impairment of the credit of his statements as to the gift, because inconsistent therewith, but when all the attending circumstances are considered, we are convinced that the statements are true notwithstanding, and that the book entries were not made because he considered the stock his own, but most likely because he deemed it in consonance with the fact that the stock stood in his name upon the stock books.

At the time of the endorsement and delivery of the stock to Mrs. Harvey, Harvey was entirely solvent, and could have had no motive whatever for covering up or concealing his property, or any of it, from his creditors. He remained solvent for a long while thereafter, so that no ulterior purpose can be ascribed to his action at that time.

But a gift once made cannot be recalled without the consent of the donee, and what Harvey may have done by way of book statements as to the asset subsequently could not affect Mrs. Harvey's title. Nor do we think that he so intended to affect her title nor in any way to withdraw or modify his primary purpose of giving her the stock, nor is it a fact established in any way that Mrs. Harvey held the stock subject to Harvey's dictation or control.

It is true as is said in *Bauernschmidt v. Bauernschmidt*, 54 Atl. 637-643:

"There can be no gift which the law will recognize where there is reserved to the donor, either expressly or as a result of the circumstances and conditions attending the transaction, a power of revocation of a dominion over the subject of the gift. There can be no locus penitentiae and there is always a locus penitentiae where the supposed donor may at any moment undo what he has done."

But there is no such element in this case. Mrs. Harvey's testimony that she received the stock from Harvey and that she continued in the sole possession with the two exceptions mentioned, we think must be taken as the true statement of the fact. She first thought that she kept the stock in her safe deposit box at the bank, but she was afterwards convinced that she kept it in her own private safe,—a lapse of memory. But the crucial fact remains that she had and continued in the sole possession no matter where she kept it. Her private safe was provided with a combination lock and her husband did not have access to the safe. The stock was as much under her dominion in that safe in her own home secure from the intrusion of her husband as it would have been in the safe deposit vault, and it was secure from his control or dominion in either event. The further discrepancies in Mrs. Harvey's narrative which have been heretofore noticed are of no greater moment than often happens with perfectly truthful and candid witnesses. Mrs. Harvey's memory, she admits herself, is not always to be trusted. But the corroboration that her testimony has received we think so fortifies the statements as to the material and potential fact that she received the stock as a gift from her husband and continued in the actual possession and dominion of the same until surrendered for exchange on November 26, 1909 for another certificate as to render them entirely worthy of belief. We cannot think that Mr. and Mrs. Harvey deliberately and corruptly devised the story about what took place and that they have sworn falsely for the sake of saving this stock from the wreck of Harvey's business affairs for the wife's benefit.

We therefore conclude that the decree of the Court below should be reversed and the cause dismissed.

We have not overlooked the rule invoked by counsel for appellee that the finding of the chancellor or the trial court upon conflicting evidence is presumably correct. In this case, however, not all the evidence was taken in open court. Indeed, the principal part of Mrs. Harvey's evidence was taken before the Referee and read upon the trial. We think, however, that a serious mistake was made by the trial court in giving undue importance to the carrying of the stock in Harvey's name on the stock books, to the minutes of the corporation meetings and to Harvey's private books, and that the strong weight of the testimony is against its findings.

[Endorsed:] Opinion. Filed Nov. 18, 1914. [Signed] F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2401.

S. G. HARVEY, Appellant and Plaintiff in Error,

vs.

B. S. STOWE, as Trustee in Bankruptcy of the Estate of J. Downey
Harvey, a Bankrupt, Appellee and Defendant in Error.

Decree.

Appeal from and Writ of Error to the District Court of the United States for the Northern District of California, First Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, First Division, and was duly submitted.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed, with costs in court below in favor of the appellant and plaintiff in error and against the appellee and defendant in error, and with directions to the said District Court to dismiss the cause.

It is further ordered, adjudged and decreed by this Court, that the appellant and plaintiff in error recover against the appellee and defendant in error for her costs herein expended, and have execution therefor.

[Endorsed:] Decree (Approved by Wolverton, D. J.). Filed and Entered November 18, 1914. [Signed] F. D. Monckton, Clerk.

At a stated Term, to-wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court-Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the eighteenth day of November, in the year of our Lord One Thousand Nine Hundred and Fourteen.

Present:

Honorable William B. Gilbert, Circuit Judge Presiding.

Honorable Erskine M. Ross, Circuit Judge.

Honorable Charles E. Wolverton, District Judge.

No. 2401.

S. G. HARVEY, Appellant and Plaintiff in Error,

vs.

B. S. STOWE, as Trustee in Bankruptcy of the Estate of J. Downey
Harvey, a Bankrupt, Appellee and Defendant in Error.

Order Staying Issuance of Mandate under Rule 32 Forty Days.

On motion of Mr. E. H. Williams, counsel for the appellant and plaintiff in error, and good cause therefor appearing, it is ordered that

the issuance of the Mandate under Rule 32 of this Court in the above-entitled cause be, and hereby is stayed for the period of forty (40) days from this date.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2401.

B. S. STOWE, as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Appellee and Defendant in Error.

vs.

S. G. HARVEY, Appellant and Plaintiff in Error.

Petition for Order Allowing Appeal and Order Allowing Same.

The above named Appellee and Defendant in Error, B. S. Stowe Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, conceiving himself aggrieved by the order and decree of the United States Circuit Court of Appeals for the Ninth Circuit made and entered in the above entitled cause on the 18th day of November, 1914, reversing the decree of the District Court of the United States, in and for the Northern District of California First Division; and directing the dismissal of the bill of complaint.

And because the matter in controversy in the above entitled cause greatly exceeds Five Thousand Dollars, besides costs, and this cause is one in which the United States Circuit Court of Appeals for the Ninth Circuit has not final jurisdiction, and it is a proper cause to be reviewed on appeal by the United States Supreme Court;

Now therefore said B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, doth hereby appeal from said order and decree of the United States Circuit Court of Appeals for the Ninth Circuit to the United States Supreme Court and doth pray that this his appeal, may be allowed, and that the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit be directed to send the records and proceedings in this cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed, by him, may be reviewed, and if error be found, corrected according to law.

San Francisco, California, December 14th, 1914.

(Signed)

BERT SCHLESINGER,

A. E. SHAW,

EDWIN H. WILLIAMS,

Solicitors for Complainant B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Appellee and Defendant in Error.

Order Allowing Appeal.

The foregoing petition for appeal is hereby granted and it is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States be and the same is hereby allowed as prayed, also ordered that this shall operate as a supersedeas upon the petitioner filing a bond in the sum of Five Thousand (\$5000) Dollars.

Dated, December 14, 1914.

(Signed)

WM. C. VAN FLEET,
United States Circuit Judge, Ninth Circuit.

[Endorsed:] Petition for order allowing appeal and order allowing same. Filed Dec. 14, 1914. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By [signed] Meredith Sawyer, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2401. In Equity.

B. S. STOWE, as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Appellant,

vs.

S. G. HARVEY, Appellee.

Assignment of Errors on Appeal.

Now comes B. S. Stowe, as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a bankrupt, appellant, and avers that the decree rendered and entered in the above-entitled cause by the Circuit Court of Appeals of the United States, in and for the Ninth Circuit, on the 18th day of November, 1914, is erroneous, and unjust to the appellant, and that in the record and proceedings herein there is manifest error; and appellant files and presents the following assignments of error upon which he will rely upon his prosecution of the appeal in the above-entitled cause from the decree made by this court as aforesaid; and said appellant sets out specifically the particulars wherein said decree is erroneous.

I.

The Circuit Court of Appeals erred in reversing the findings and decree of the District Court of the United States, in and for the Northern District of California, Division Number One, and in ordering that the Bill of Complaint be dismissed, because the appellant herein was entitled, under the law and facts, to an affirmance of the judgment and decree rendered and entered in his favor by said District Court.

II.

The Circuit Court of Appeals erred in ordering the Bill of Complaint of B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, dismissed, and in reversing the findings and decree of the said District Court awarding to complainant the relief prayed for in his bill.

III.

The Circuit Court of Appeals erred in its failure to affirm the findings and decree of the said District Court awarding the complainant B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, the relief prayed for in the bill, because the findings and decree of said District Court were supported by competent legal evidence.

IV.

The Circuit Court of Appeals erred in not affirming the findings and decree of the District Court in favor of appellant, because the findings and decree of said District Court were supported by the great preponderance of evidence.

V.

The Circuit Court of Appeals erred in reversing the decree of the District Court, because said decree was based on written findings of fact, which said findings were supported by oral testimony, taken in open court, and was also supported by documentary evidence.

VI.

The Circuit Court of Appeals erred in substituting its judgment upon the facts in place of the judgment and decision of said District Court, because the witnesses appeared personally and testified before said District Court, in open court, and said court was the sole and exclusive judge of the credibility of such witnesses, and the weight to be given to their evidence, and the great preponderance of the evidence was in favor of the said findings and decree of the said District Court.

VII.

The Circuit Court of Appeals erred in reversing the findings and decree of said District Court, because the judge of said District Court saw and heard the witnesses himself, observed the demeanor of such witnesses, and was by law vested with the power to determine the weight to be given to their testimony, as well as their credibility.

VIII.

The Circuit Court of Appeals erred in reversing the findings and decree of said District Court, because said findings and decree were based on conflicting evidence, oral and documentary, taken in open

court, and said District Court was empowered to determine the weight to be accorded such evidence.

IX.

The Circuit Court of Appeals erred in reversing the findings and decree of said District Court, because said findings and decree were based upon conflicting testimony and upon the credibility of witnesses. It therefore became the duty of said court to treat such findings as unassailable.

X.

The Circuit Court of Appeals erred in failing to observe the general rule heretofore declared by it in this class of cases, "that findings of the trial judge, in an equity suit based on the evidence of witnesses before him and resulting in a substantial conflict with respect to the material issues, will not be set aside on appeal."

XI.

The Circuit Court of Appeals erred in reversing the determination of the trial judge as to the weight to be given to the testimony of witnesses J. Downey Harvey and S. G. Harvey, and each of said witnesses, as both of said witnesses had personally appeared and testified before the trial judge, and the said trial judge was the only person competent to pass upon the weight to be given to the testimony of such witnesses, and each of them, and their credibility.

XII.

The Circuit Court of Appeals erred in reversing the findings of the trial judge as to the weight to be given to the evidence of the witnesses Burke Corbet, Charles W. Fay, Edwin Adams Wasserman and James W. Crosby, as each and all of said witnesses personally appeared and testified before the trial judge in open court, and said trial judge was alone empowered to determine by his own judgment the weight to be accorded the testimony of such witnesses.

XIII.

The Circuit Court of Appeals erred in failing to hold under the authorities of the United States Supreme Court that, as the findings of fact of the District Court were based upon oral testimony, taken in open court, and documentary evidence considered in open court, such findings must be treated as conclusive of the facts therein found, if supported by any evidence.

XIV.

The Circuit Court of Appeals erred in reversing the finding of fact made by said District Court, that on the 26th day of November, 1909, J. Downey Harvey was the owner of five hundred forty-six (546) shares of the capital stock of the Shore Line Investment Company, a corporation duly incorporated under the laws of the State of

California, and that on the 26th day of November, 1909, said J. Downey Harvey gave to said S. G. Harvey the said property; and that said transfer was made by said J. Downey Harvey to S. G. Harvey without consideration of any kind; and was purely voluntary, to-wit: that of love and affection; because it appears from the evidence in the case that said finding of fact was supported by a preponderance of evidence in favor of said complainant, and is based upon competent legal evidence.

XV.

The Circuit Court of Appeals erred in reversing the finding of the District Court that the transfer of said stock was made by J. Downey Harvey to S. G. Harvey with the intent to delay and defraud the creditors of said J. Downey Harvey of their demands, and said transfer was accepted and taken by said S. G. Harvey with the intent and purpose to delay and defraud the said creditors of their said demands, because said finding was and is based upon competent legal evidence.

XVI.

The Circuit Court of Appeals erred in reversing the finding numbered 13 of the District Court, that "the said J. Downey Harvey did not on or about the 26th day of June, 1905, endorse a certificate for three hundred (300) shares of the capital stock of the Shore Line Investment Company, by writing his name upon the back thereof, or otherwise, to the defendant, S. G. Harvey, nor did he give or deliver said certificate, or the shares represented thereby, to said S. G. Harvey; and that said J. Downey Harvey did not on the 29th day of August, 1905, or thereabouts, endorse to the said S. G. Harvey a certificate of stock for sixty-six (66) shares of the capital stock of the Shore Line Investment Company, and did not give or deliver said certificate, or the shares represented thereby, to said S. G. Harvey, the defendant; and that the said J. Downey Harvey did not on or about the 25th day of September, 1905, endorse a certificate, or certificates, for one hundred and eighty (180) shares of the capital stock of the Shore Line Investment Company, or give or deliver said certificates to said S. G. Harvey, or the shares represented thereby," because the evidence in the case established the fact that the transfer of said certificates was not made in the year 1905, but on the 26th day of November, in the year 1909, at which time it was admitted by the pleadings that said J. Downey Harvey was hopelessly insolvent, and unable to pay his debts, from his own means, as they became due.

XVII.

The Circuit Court of Appeals erred in failing to apply the rule of law that the burden of proof in this case to establish the claim that the gift was made in 1905, and not in 1909, was upon the defendant.

XVIII.

The Circuit Court of Appeals erred in not finding in its opinion that the said defendant had failed to establish by clear and convince-

ing evidence, or by great preponderance of the evidence, that the gift was made in 1905, as claimed by her.

XIX.

The Circuit Court of Appeals erred in holding in its opinion that J. Downey Harvey gave five hundred forty-six (546) shares of the capital stock of the Shore Line Investment Company, a corporation, to S. G. Harvey, his wife, in the year 1905, as the evidence showed that such gift was made in 1909, when he was admitted to be insolvent.

XX.

The Circuit Court of Appeals erred in holding in its opinion that J. Downey Harvey was solvent at the time he gave five hundred forty-six shares of the capital stock of the Shore Line Investment Company to his wife, S. G. Harvey, as the evidence showed that the gift was not made in 1905, but only in 1909, when he was admitted to be insolvent.

XXI.

The Circuit Court of Appeals erred in reversing finding of fact numbered 3 of said District Court, because the said finding of fact and the decree based thereon, were supported by the great preponderance of the evidence.

XXII.

The Circuit Court of Appeals erred in reversing finding of fact numbered 4 of said District Court, because the said finding of fact, and the decree based thereon, were supported by the great preponderance of the evidence.

XXIII.

The Circuit Court of Appeals erred in reversing the finding of said District Court, numbered 6, because the said finding, and decree based thereon, were supported by the great preponderance of the evidence.

XXIV.

The Circuit Court of Appeals erred in reversing the finding of fact numbered 8 of said District Court, because the said finding, and decree based thereon, were supported by the great preponderance of the evidence.

XXV.

The Circuit Court of Appeals erred in reversing finding of fact numbered 9 of said District Court, because the said finding, and decree based thereon, were supported by the great preponderance of evidence.

XXVI.

The Circuit Court of Appeals erred in reversing finding of fact numbered 10 of said District Court, because the said finding, and de-

ecree based thereon, were supported by the great preponderance of evidence.

XXVII.

The Circuit Court of Appeals erred in reversing finding of fact numbered 11 of said District Court, because the said finding, and decree based thereon, were supported by the great preponderance of evidence.

XXVIII.

The Circuit Court of Appeals erred in reversing finding of fact numbered 12 of the said District Court, because the said finding and decree based thereon was supported by the great preponderance of the evidence.

XXIX.

The Circuit Court of Appeals erred in reversing finding of fact numbered 14 of the said District Court, because the said finding and the decree based thereon were supported by the great preponderance of the evidence.

XXX.

The Circuit Court of Appeals erred in reversing the findings of fact made and entered in said cause by said District Court, because the said findings, and each and every of them, were supported by competent, legal evidence, and the great weight of evidence.

XXXI.

The Circuit Court of Appeals erred in reviewing said findings of fact, as no exceptions were made thereto, or any requests made for any or different findings.

XXXII.

The Circuit Court of Appeals erred in not finding that the material allegations of plaintiff's complaint were true.

XXXIII.

The Circuit Court of Appeals erred in not finding as a conclusion of law based on the findings of fact of the District Court and the evidence adduced in support thereof that the appellant was entitled to an affirmance of the decree annulling and cancelling the transfers by said J. Downey Harvey to S. G. Harvey of the five hundred and forty-six (546) shares of the capital stock of the Shore Line Investment Company, and declaring the same null and void, and declaring appellant to be the owner thereof, together with the dividends paid thereon.

XXXIV.

The Circuit Court of Appeals erred in considering in its opinion as evidence in the case, evidence admitted over the objection of com-

plainant, hearsay testimony of a declaration alleged to have been made by J. Downey Harvey to the witness Burke Corbet, as follows:

"He said to me at that time that he was buying the stock and was giving it to Mrs. Harvey. I suggested to him then, that if this were true, the stock should be issued in Mrs. Harveys name. * * * At all the times, before any stock was ever issued in the name of Mr. Harvey, he stated to me that he had given the stock to Mrs. Harvey. After the stock was issued, we discussed it a number of times, and he told me that he had given it to Mrs. Harvey."

to which objection was made at the time of the trial.

XXXV.

The Circuit Court of Appeals erred in considering in its opinion as evidence in the case, hearsay testimony of a declaration alleged to have been made by J. Downey Harvey to the witness Charles W. Fay, as follows:

"Mr. Harvey told me at this time that this stock was Mrs. Harvey's. This was in 1906 * * * I called on Mr. Harvey and asked him for the stock held in his name in this company, explaining my purpose. He said he would get the stock, that it was Mrs. Harvey's stock. I asked him how long it would be and he said he would have to send for it. I believe Mrs. Harvey was then at Del Monte."

to which objection was made at the time of the trial.

XXXVI.

The Circuit Court of Appeals erred in considering in its opinion as evidence in the case, hearsay testimony of a declaration alleged to have been made by S. G. Harvey to the witness Mrs. Ward Barron, as follows:

"My mother was worried very often about the affairs of the Ocean Shore, and I asked her if she did not have anything of her own that would be very valuable, and she said that she had shares in the Shore Line Investment Company, and those, Mr. Harvey told her, were going to be very valuable some day",

to which objection was made at the time of the trial.

XXXVII.

The Circuit Court of Appeals erred in considering in its opinion as evidence in the case, hearsay testimony of a declaration alleged to have been made by J. Downey Harvey to the witness Edwin Adams Wasserman, as follows:

"Mr. Harvey told me that Mrs. Harvey had possession of the stock at this time when the assessment was paid. This date was April 13th, 1907",

to which objection was made at the time of the trial.

XXXVIII.

The Circuit Court of Appeals erred in considering in its opinion as evidence in the case, hearsay testimony of a declaration alleged to have been made by J. Downey Harvey to the witness James W. Crosby, as follows:

"He told me at that time that it was to pay the assessment on Mrs. Harvey's stock, that Mrs. Harvey was away at the time and consequently he could not get the certificates, but that he would bring them to me later to have the notation 'assessment paid' stamped or written on the backs of the certificates * * * I do not know if he said the stock belonged to Mrs. Harvey in so many words or not. He told me the stock was Mrs. Harvey's at that time."

to which objection was made at the time of the trial.

XXXIX.

The Circuit Court of Appeals erred in not finding as a matter of law that the alleged transfer was void under Section 3440 of the Civil Code of the State of California.

XL.

The Circuit Court of Appeals erred in not finding as a matter of law that the alleged transfer was void as against the creditors of J. Downey Harvey.

XLI.

The Circuit Court of Appeals erred in not finding as a matter of law that the alleged transfer was fraudulent and void as to the plaintiff.

XLII.

The Circuit Court of Appeals erred in not finding, according to the facts found in its opinion, that as a conclusion of law the decree should have been affirmed.

Wherefore, the appellant, B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, prays that the decree of the Circuit Court of Appeals of the United States in and for the Ninth Circuit be reversed, and that the judgment entered in his favor by the District Court of the United States in and for the Northern District of California be affirmed, and restored to its full force and effect, and that such other relief be awarded as the nature of the case requires.

(Signed)

BERT SCHLESINGER,
A. E. SHAW,
EDWIN H. WILLIAMS,

Solicitors for Complainant, B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Plaintiff in Error and Appellant.

[Endorsed:] Assignments of error on appeal. Filed Dec. 14, 1914.
Frank D. Monckton, Clerk U. S. District Court of Appeals for the
Ninth Circuit. By [signed] Meredith Sawyer, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2401.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. Downey
Harvey, a Bankrupt, Appellant,
vs.
S. G. HARVEY, Appellee.

*Bond on Appeal from Decree of Circuit Court of Appeals to the
Supreme Court of the United States.*

Know all men by these presents: That the Pacific Coast Casualty Company, a corporation duly organized under the laws of the State of California is held and firmly bound unto S. G. Harvey in the full and just sum of Five Thousand Dollars (\$5,000.00), Gold Coin of the United States of America, to be paid to said S. G. Harvey, her attorneys, executors, administrators or assigns, to which payment well and truly to be made said corporation does hereby bind itself, its successors and assigns, jointly and severally by these presents.

Sealed with our seal and dated this 15th day of December, in the year of our Lord One Thousand Nine Hundred and Fourteen.

Whereas, the appellant in the above-entitled suit has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the United States Circuit Court of Appeals for the Ninth Circuit, on the eighteenth day of November, 1914, in the action wherein B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, was complainant, and S. G. Harvey was defendant; and

Whereas, said appellant has obtained from the said Court an order allowing an appeal to the Supreme Court of the United States to reverse said decree of the United States Circuit Court of Appeals in the aforesaid suit, and a citation directed to S. G. Harvey, citing and admonishing her to be and appear at the United States Supreme Court, to be holden at Washington, District of Columbia;

Now, therefore, the condition of this obligation is such that if the said appellant shall prosecute said appeal to effect and answer all damages and costs, if he fail to make said appeal good, then the above obligation shall be void; otherwise, to remain in full force and effect.

PACIFIC COAST CASUALTY COMPANY,

(Signed)

By R. W. STEWART,

[SEAL.]

Attorney-in-Fact.

The foregoing bond is approved in form, and the sufficiency of the surety therein named is hereby approved, this 15th day of December, A. D. 1914.

(Signed)

WM. C. VAN FLEET, Judge.

[Endorsed:] Bond on appeal from decree of Circuit Court of Appeals to the Supreme Court of the United States. Filed Dec. 15, 1914. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By [signed] Meredith Sawyer, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2401.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Appellant,

vs.

S. G. HARVEY, Appellee.

Prayer for Reversal.

To the Honorable the Supreme Court of the United States:

Now comes complainant B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, appellant, and prays for a reversal of the order and decree of the Circuit Court of Appeals of the United States, made and entered in the above entitled cause on the 18th day of November, 1914, and that the order and decree of the District Court of the United States, in and for the Northern District of California, in favor of said B. S. Stowe, Trustee in Bankruptcy of the estate of J. Downey Harvey, a Bankrupt, be affirmed and restored to full force and effect, and for such other and further relief as may be required from the nature of the cause.

(Signed)

A. E. SHAW,

BERT SCHLESINGER,

EDWIN H. WILLIAMS,

Solicitors for Complainant, B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Appellant.

[Endorsed:] Prayer for reversal. Filed Dec. 21, 1914. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By [signed] Meredith Sawyer, Deputy Clerk.

Receipt of a copy of the within Prayer for Reversal is hereby admitted this 21st day of December, 1914.

(Signed)

CHARLES S. WHEELER AND

JOHN F. BOWIE,

Attorneys for S. G. Harvey, Appellee.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2401.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. Downey
Harvey, a Bankrupt, Appellant,

vs.

S. G. HARVEY, Appellee.

Præcipe for Transcript on Appeal.

To the Clerk of the above entitled Court:

SIR: Please make up and issue in the above-entitled cause, a certified transcript of the record in the above entitled cause, upon an appeal allowed herein, to the Supreme Court of the United States, the said transcript to include the following:

All papers included in the printed Transcript of Record upon appeal from and Writ of Error to the United States District Court for the Northern District of California, First Division, on which the above entitled cause was heard in said Circuit Court of Appeals and consisting of:

Complaint of Plaintiff.

Summons.

Order to Show Cause and Temporary Restraining Order.

Answer of Defendant S. G. Harvey.

Disclaimer of J. Downey Harvey.

Opinion of De Haven, District Judge, upon the issuance of Temporary Injunction.

Minute Order made February 29th, 1912, granting injunction pendente lite.

Opinion of the Court, (Farrington, J.)

Findings of Fact and Conclusions of Law.

Decree.

Petition for Allowance of appeal and order endorsed thereon.

Assignment of Errors on appeal.

Statement of evidence upon appeal, with stipulation of parties and approval of Judge as annexed thereto.

Citation on Appeal.

Petition for writ of error and order of allowance endorsed thereon.

Assignment of errors on writ of errors.

Writ of Error.

Citation on Writ of Error.

Bond on appeal and writ of error.

Amended præcipe for transcript.

Stipulation for single transcript and order of allowance.

Order extending time to file record and docket cause.

Also the following papers filed with you in the above entitled cause:

Order of submission, entered May 28, 1914.

Opinion of the United States Circuit Court of Appeals, (Gilbert, Wolverton and Van Fleet).

Order directing filing of opinion and entry of decree.

Decree of Circuit Court of Appeals.

Petition of B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, for allowance of Appeal and Order endorsed thereon.

Assignment of Errors on appeal from decree of United States Circuit Court of Appeals.

Prayer for Reversal.

Citations on appeal from decree of United States Circuit Court of Appeals.

Bond on said appeal, and Order approving same.

Præcipe for Transcript of record on said appeal.

Certificate of Clerk of the United States Circuit Court of Appeals for the Ninth Circuit to said Transcript.

You will also please transmit to the Supreme Court of the United States, with the transcript above mentioned, the original citations on appeal to said Court.

(Signed)

A. E. SHAW,

BERT SCHLESINGER,

EDWIN H. WILLIAMS,

*Solicitors for Complainant and Appellant,
B. S. Stowe, Trustee in Bankruptcy of
the Estate of J. Downey Harvey, a
Bankrupt.*

Dated at San Francisco, California, this 21st day of December, A. D. 1914.

[Endorsed:] Receipt of a copy of the within Præcipe is hereby admitted this 21st day of December, 1914.

(Signed)

CHARLES S. WHEELER AND

JOHN F. BOWIE,

Attorneys for S. G. Harvey, Appellee.

Præcipe for Transcript on Appeal. Filed Dec. 21, 1914. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2401.

S. G. HARVEY, Appellant and Plaintiff in Error,

vs.

B. S. STOWE, as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Appellee and Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing

two hundred and forty-seven (247) pages, numbered from and including 1 to and including 247, to be a true copy of the complete record made pursuant to the præcipe filed by counsel for the appellee and defendant in error on the 21st day of December, A. D. 1914, under Rule 8 of the Supreme Court of the United States, in the above-entitled case, including the Assignment of Errors on Appeal to the Supreme Court of the United States, and of all proceedings had, and of all papers, including the opinion, filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same, together, constitute the Transcript of Record on appeal to the Supreme Court of the United States in the above-entitled cause as made and certified pursuant to the said præcipe.

Attest my hand and the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this second day of January, A. D. 1915.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

10-cent revenue stamp canceled, Jan. 2, 1915. F. D. M., C. C. A.

UNITED STATES OF AMERICA, ss:—

The President of the United States to S. G. Harvey, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, District of Columbia, to be held on the 8th day of February, A. D. 1915, being within sixty (60) days from the date hereof, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, in the cause numbered 2401 in the records of said court, wherein you are the Appellee and defendant, and B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, is Appellant and Complainant, to show cause, if any there be, why the decree there rendered against said B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, as in said appeal and in said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 19th day of December, A. D. 1914.

WM. B. GILBERT,
United States Circuit Judge.

Receipt of a copy of the within Citation is hereby admitted this 21st day of December, 1914.

CHARLES S. WHEELER AND
JOHN F. BOWIE,
Solicitors for Defendant S. G. Harvey and Appellee.

[Endorsed:] Docketed. No. 2401. In the Circuit Court of Appeals of the United States in and for the Ninth Circuit. The President of the United States to S. G. Harvey. Citation on Appeal. Filed Dec. 21, 1914. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit, by Meredith Sawyer, Deputy Clerk. Schlesinger & Shaw, Edwin H. Williams, Attorneys at Law, San Francisco, Cal.

UNITED STATES OF AMERICA, ss:

The President of the United States to S. G. Harvey, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, District of Columbia, to be held on the 8th day of February, A. D. 1915, being within sixty (60) days from the date hereof, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, in the cause numbered 2401 in the records of said court, wherein you are the Appellee and defendant, and B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, is Appellant and Complainant, to show cause, if any there be, why the decree there rendered against said B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, as in said appeal and in said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 15th day of December, A. D. 1914.

WM. C. VAN FLEET,

United States Circuit Judge.

Receipt of a copy of the within Citation is hereby admitted this 21st day of December, 1914.

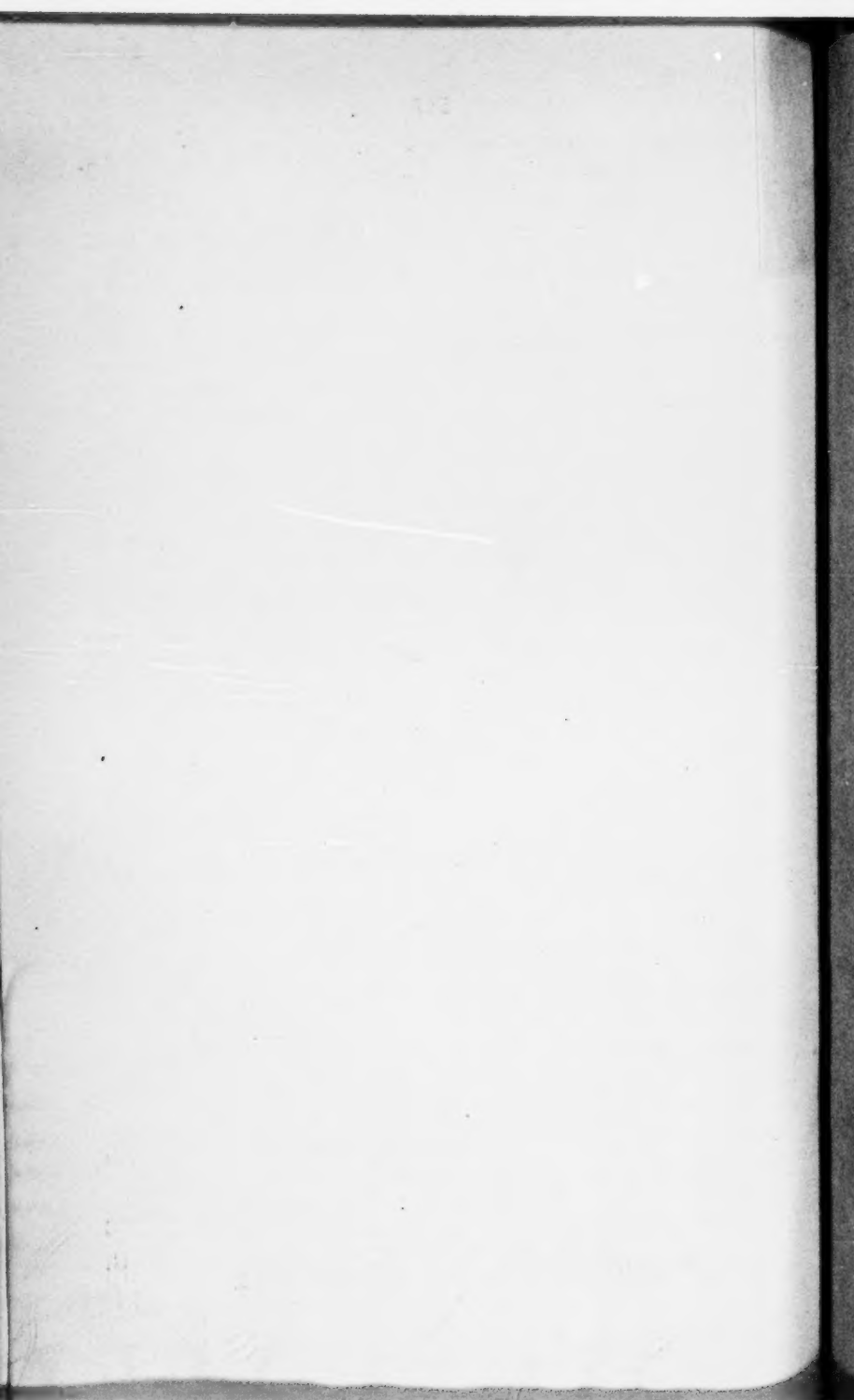
CHARLES S. WHEELER AND

JOHN F. BOWIE,

Solicitors for Defendant S. G. Harvey and Appellee.

[Endorsed:] Docketed. No. 2401. In the Circuit Court of Appeals of the United States, Ninth Circuit. B. S. Stowe, Trustee in Bankruptcy of the Estate of the estate of J. Downey Harvey, a bankrupt, Appellant, vs. S. G. Harvey, Appellee. Citation. Filed Dec. 21, 1914. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit, by Meredith Sawyer, Deputy Clerk. Bert Schlesinger, Attorney for Appellant, Claus Spreckels Building, San Francisco, Cal.

Endorsed on cover: File No. 24,522. U. S. Circuit Court Appeals, 9th Circuit. Term No. 778. B. S. Stowe, trustee in bankruptcy of the estate of J. Downey Harvey, a bankrupt, appellant, vs. S. G. Harvey. Filed January 18th, 1915. File No. 24,522.



6
Office Supreme Court, U. S.

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1914

No. **329**

B. S. SROWE, Trustee in Bankruptcy of the
Estate of J. Downey Harvey, a bankrupt, *Appellant*,

VS.

S. G. HARVEY, *Appellee*.

Appeal from the United States Circuit Court of Appeals
for the Ninth Circuit.

APPELLANT'S OPENING BRIEF.

BERT SCHLESINGER,
A. E. SHAW,
EDWARD M. CLEARY, EDWIN H. WILLIAMS,
Of Counsel. Attorneys for Appellant.

Filed March....., 1916.



Index to Argument of Appellant.

	Page
OPENING STATEMENT	1
SPECIFICATION OF ERRORS.....	6
BRIEF OF ARGUMENT OF APPELLANT.....	9
Trial court is proper forum for determination of facts especially where witnesses appeared in open court and gave oral testimony.....	9
The decision of the trial court was in favor of plaintiff and was reversed on a pure question of fact which depended upon the credit and weight to be given to the testimony of defendants	9
Authorities hold that trial judge proper person to determine credibility of witnesses.....	11
Particularly in cases of fraud.....	13
The trial of this case was had in accordance with new equity rule 46 of 1912.....	14
The single issue of fact in this case is: Did Harvey deliver the stock to his wife in 1905 when he was solvent or in 1909 when he was insolvent.....	18
Both the trial and appellate courts have held that complainant made out a prima facie case in support of this issue and that the burden of proof was shifted to defendant, Mrs. Harvey..	19
Summary of uncontradicted evidence in support of plaintiff's case	20
Testimony of Mrs. S. G. Harvey, the contesting defendant	23
Mrs. Harvey swears that she received the stock on June 26, 1905, at San Francisco, Cal., and produces a written memorandum of the date of delivery. It is proven that she was not in San Francisco but was in New York on that date..	23
Mrs. Harvey changes her testimony in order to adjust it to the facts.....	25
Mrs. Harvey destroys the original memoranda after being ordered to produce them in court, and produces a copy only.....	26

	Page
Mrs. Harvey swears that she deposited the certificates of stock in her safe deposit box on certain specified dates but the records of the safe deposit company show that she did not do so	27
Mrs. Harvey admits that her testimony is untrue just as the last objection to the admission of the safe deposit records in evidence is overruled	30
Authorities hold that the trial judge was justified in rejecting Mrs. Harvey's testimony as unworthy of belief.....	31
Testimony of J. Downey Harvey.....	32
Harvey retained record title to the stock and exercised every power of dominion over it for more than four years after the date of the alleged gift to his wife.....	33
The stock was transferred of record just ten days before Harvey's insolvency was made public..	34
The stock was carried upon Harvey's books of account as his own property. No record was made of the gift in his ledger account of "Family gifts and allowances".....	36
The trial court's discussion of the significance of the entries in Harvey's books and other written declarations of ownership made by him.....	38
Only other evidence in support of defendant's case consists of testimony of self-serving declarations made by parties to the gift.....	43
Authorities hold such evidence is inadmissible or, at best, entitled to little weight.....	44
Testimony of Wasserman.....	45
Testimony of Crosby	47
Testimony of Corbet.....	47
Testimony of Fay.....	49
These declarations do not prove the delivery of the stock, which is the fact in issue.....	50
Authorities and comment of the trial judge..	51

	Page
Defendants failed to produce other witnesses who are shown to have had knowledge of the facts.....	53
Mrs. Harvey permitted her husband to retain the apparent title to this stock for more than four years after it was given to her (if her story is to be believed), and thus clothed him with a false credit...	53
Authorities	56
There was no actual and continuous change of possession of the stock at the time of the gift as required by the California statute against fraudulent conveyances	57
The delivery of the certificate of stock is merely a symbolic delivery of the property; Harvey possessed the stock itself until after he became insolvent.....	59
Authorities	60
CONCLUSION	62

List of Cases Cited.

	Page
<i>Blanc v. Connor</i> , 167 Cal. 719.....	50
<i>Callahan v. Meyers</i> , 128 U. S. 617.....	13
<i>Crawford v. Neal</i> , 144 U. S. 585; 36 L. Ed. 559.....	14
<i>Dade v. Irwin, Executor</i> , 2 How. 383; 11 L. Ed. 312.....	13
<i>Davis v. Schwartz</i> , 155 U. S. 637; 39 L. Ed. 293.....	11
<i>Film Producers v. Jordan</i> , 51 Cal. Decisions, pg. 35.....	59
<i>Foster Federal Practice</i> , 5 Ed., Vol. 3, pg. 2359.....	18
<i>Guthrie v. Carney</i> , 19 Cal. App. 144.....	52
<i>Hopkins Federal Equity Rules</i> , pg. 31.....	15
<i>Holt v. Utah</i> , 110 U. S. 574.....	44
<i>Horwitz-Jones Commentaries on Evidence</i> , (Blue Book)	
Volume 2, Sec. 235a.....	44
<i>Jordan v. Crickett</i> , 99 N. W. 164.....	31
<i>Kierzkowski v. Dorion</i> , 5 Moore P. C. Cases (N. S.) 397....	31
<i>Kimberly v. Arms</i> , 129 U. S. 512.....	12
<i>McKinley Creek Mining Co., v. Alaska United Co.</i> , 183	
U. S. 563.....	12
<i>Moore v. Page</i> , 111 U. S. 117.....	56
<i>Murphy v. Mulgrew</i> , 102 Cal. 547.....	58
<i>National Bank v. Hobbs</i> , 118 Fed. 627.....	42
<i>National Bank of Athens v. Shackelford</i> , (Dec. 15, 1915)	
U. S. Supreme Court Adv. Op. No. 2, Lawyers' Ed., 17	56
<i>Payne v. Eliot</i> , 54 Cal. 339.....	60
<i>Roberts v. Roberts</i> , 168 Cal. 307.....	33
<i>Stevens v. Irwin</i> , 15 Cal. 503.....	58
<i>Sonnentheil v. Brewing Co.</i> , 172 U. S. 401.....	13, 65
<i>Tregear v. Etiwanda Water Co.</i> , 76 Cal. 537.....	59
<i>Twynes Case</i> , decided Star Chamber, 1601, 3 Coke, 80b...	66
<i>Wooster v. Trowbridge</i> , 115 Fed. 731.....	43
<i>Vanderbilt v. Bishop</i> , 199 Fed. 421.....	17

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1914
No. 778

B. S. STOWE, Trustee in Bankruptcy
of the Estate of J. Downey Harvey,
a bankrupt,

Appellant,

VS.

S. G. HARVEY,

Appellee.

Appeal from the United States Circuit Court of Appeals
for the Ninth Circuit.

APPELLANT'S OPENING BRIEF.

Opening Statement.

J. Downey Harvey, one of the defendants in this action, was adjudicated a bankrupt by the District Court of the United States in and for the Northern District of California and at the first meeting of

his creditors held on the 17th day of November, 1911, B. S. Stowe was regularly elected his Trustee in Bankruptcy and qualified as such. Thereafter on January 11, 1912, Mr. Stowe filed the present suit in equity in behalf of Mr. Harvey's creditors to set aside as fraudulent a transfer of 546 shares of the capital stock of the Shore Line Investment Company made by Harvey to his wife. The value of this stock is alleged to be \$109,200, and it is charged that Mrs. Harvey, who is the principal defendant in the action, has collected \$11,486 in dividends on the stock.

Mrs. S. G. Harvey in her answer admits that the stock is of the value of \$50,000, and admits that she has received the dividends as alleged by plaintiff.

She also admits that the only consideration for the transfer of the stock was love and affection.

The complaint alleges and the defendants admit that J. Downey Harvey was insolvent on the 26th day of November, 1909; that he owed at that time upwards of \$200,000 to his unsecured creditors, and that the assets of his estate in bankruptcy are insufficient to pay his creditors more than two per cent. in dividends. The complaint further charges that Harvey gave this stock to his wife on November 26, 1909, when he was admittedly insolvent. Mrs. Harvey admits in her answer that the stock was not transferred on the corporation books until November 26, 1909, but claims that the certificates themselves were actually given and delivered to

her by her husband in the year 1905 when he was admittedly solvent.

At the trial, the defendants testified that the husband delivered the stock to his wife privately and upon the understanding then had between themselves that the record title to it should remain in the name of the donor, so that he might appear to the public to be a large stockholder in the corporation. The stock was held in the donor's name in pursuance of the alleged understanding, for a period of more than four years during which time the husband acted in all respects as the apparent owner of the property and carried the stock as his own property upon his private books of account. It was only after his admitted insolvency, in November, 1909, that the alleged gift was transferred of record into the name of the donee and the wife's claim to the property first publicly asserted.

In this connection it is to be noted that while both Mr. and Mrs. Harvey were made defendants to the action Mr. Harvey merely filed a disclaimer, while his wife appeared by her own separate attorneys and filed a verified answer. The trial was ordered on the issues raised by the answer of Mrs. S. G. Harvey, and, at the opening of the trial, Mrs. Harvey's attorney made a statement in which he waived all issues except that single one, as to the time when the gift was made. This is the only question of fact which is in dispute between the parties to the suit.

The Chancellor personally presided at the trial of the case and heard the oral testimony of all the witnesses in open court. Every witness, without exception, on either side of the case appeared personally and gave oral testimony. After hearing this testimony the Chancellor filed a lengthy written opinion in which he discussed the facts in the case and determined that the stock in question had not been given by Mr. Harvey to his wife until November 26, 1909; that Mr. Harvey was insolvent at that time, and that the gift was fraudulent and void as against Mr. Harvey's creditors and the complainant herein (Trans. pg. 27).

Mrs. Harvey appealed the case to the Circuit Court of Appeals, Ninth Circuit, and that court reversed the decision of the trial court on the question of fact presented upon the record.

The appellate court did not criticise the decision of the trial court on any point of law, but held that the error committed was in weighing the evidence and passing upon the credibility of the witnesses.

The decree of the appellate court ordered that plaintiff's bill be dismissed, and from that decree we have taken the present appeal.

The main proposition which we urge upon this appeal is that the trial court, having actually heard the oral testimony of the witnesses, was better qualified to judge their credibility and to weigh the evidence than was the appellate court which merely

reviewed the evidence in the printed record and that the district court was clearly justified in its finding that the gift was not made until 1909. We contend that the evidence in support of the finding of the Chancellor that the gift was made in 1909 and not in 1905, is overwhelming, and that the reversal of his decision by the appellate court on a pure question of fact was unwarranted and erroneous.

The appellant also raises two propositions of law.

We contend that even accepting the story of Mr. and Mrs. Harvey the gift is void as against Harvey's creditors for the reason that Mrs. Harvey for a period of more than four years permitted her husband to retain the apparent title to this property and to hold himself out to the world as the real owner of it. By so doing she clothed him with a false credit and cannot now be permitted to claim a right superior to that of his creditors.

It is also claimed by the appellant that there was no actual and continuous change of possession of the property given by Mr. Harvey to his wife as required by the California statute against fraudulent conveyances, and that the uncontradicted evidence on both sides shows that Mr. Harvey retained the actual possession of these shares of stock for more than four years after the time when the alleged gift was made.

Specifications of Errors.

1.

The Circuit Court of Appeals erred in substituting its judgment of the facts in place of the judgment of the District Court as evidence in the record clearly supported every finding of fact made by the District Court, and all the witnesses in the case appeared personally before the Chancellor presiding in the District Court and gave oral testimony in open court. Under such circumstances the Chancellor of the District Court was best fitted to determine the weight to be given to the evidence and the credibility of the witnesses who testified. It is the determination of the Chancellor on these points which was reversed by the Circuit Court of Appeals (see Specification VI) (Trans. pg. 215).

2.

The Circuit Court of Appeals erred in reversing the finding of the trial court that the stock involved in this controversy was delivered in 1909, when J. Downey Harvey was admittedly insolvent, and not in 1905, when he was solvent, in this, that the finding of the trial court that the stock was delivered not earlier than 1909 was sustained by the great weight of the evidence (Specification XIV).

3.

The Circuit Court of Appeals erred in reversing the findings of fact and decree of said District Court as such findings and decree were based on conflicting

evidence and under such circumstances the findings and decree of the District Court as to the facts of the case were final (see Specification VIII).

4.

The Circuit Court of Appeals erred in reversing the decree of the District Court as it was proven by uncontradicted evidence that the gift of the personal property in controversy made by Harvey to his wife was not accompanied by immediate delivery and actual and continuous change of possession as required by Section 3440, Civil Code, State of California (see Specification XXXIX).

5.

The Circuit Court of Appeals erred in reversing the decree of the District Court in that it was proven by uncontradicted evidence that for a period of four and a half years after the time when the defendants allege that the gift of the property in question was made by Harvey to his wife, Mrs. Harvey permitted her husband to hold himself out to the world as the ostensible owner of the property for the purpose of conferring upon him a false credit (see Specification XL) (Trans. pg. 221).

6.

The Circuit Court of Appeals erred in considering as evidence in the case, over the objection of complainant, hearsay testimony of a self-serving dec-

laration alleged to have been made by defendant S. G. Harvey to the witness Mrs. Ward Barron, as follows:

"My mother was worried very often about the affairs of the Ocean Shore, and I asked her if she did not have anything of her own that would be very valuable, and she said that she had shares in the Shore Line Investment Company, and those, Mr. Harvey told her, were going to be very valuable some day" (see Specification XXXVI).

7.

The Circuit Court of Appeals erred in considering as evidence in the case, over the objection of complainant, hearsay testimony of a self-serving declaration alleged to have been made by J. Downey Harvey to the witness Burke Corbet as follows:

"He said to me at that time that he was buying the stock and was giving it to Mrs. Harvey. I suggested to him then, that if this were true, the stock should be issued in Mrs. Harvey's name. * * * At all times, before any stock was ever issued in the name of Mr. Harvey, he stated to me that he had given the stock to Mrs. Harvey. After the stock was issued, we discussed it a number of times and he told me that he had given it to Mrs. Harvey" (see Specification XXXIV).

8.

The Circuit Court of Appeals erred in considering as evidence in the case, over the objection of complainant, hearsay testimony of a self-serving declaration alleged to have been made by J. Downey Harvey to the witness Charles W. Fay as follows:

"Mr. Harvey told me at this time that this stock was Mrs. Harvey's. This was in 1906. * * * I called on Mr. Harvey and asked him for the stock held in his name in this company, explaining my purpose. He said he would get the stock, that it was Mrs. Harvey's stock" (see Specification XXXV).

Argument of Appellant.

THE TRIAL COURT IS PROPER FORUM FOR DETERMINATION OF FACTS, WHERE WITNESSES APPEAR IN PERSON AND GIVE ORAL TESTIMONY.

At the termination of the trial of this action the Judge of the trial court filed an opinion in which he reviews in detail all the evidence of the case and reaches the conclusion that the conveyance of the five hundred and forty-six shares of stock of the Shore Line Investment Company from J. Downey Harvey to his wife was fraudulent as against Harvey's creditors. The trial Judge reached this conclusion as a result of the determination of a question of fact and he bases his opinion largely upon the proposition that the testimony of Mr. Harvey and his wife is not entitled to credence. The opinion is set out in full in the transcript (see pages 27 to 46) and contains a careful discussion of the testimony of Mr. and Mrs. Harvey which discloses the inconsistencies and contradictory statements existing in it. Stress is laid upon the admission of Mrs. Harvey that certain of her positive statements were not true in fact. The trial Judge concludes that the inaccurate statements in Mrs. Harvey's testimony are not due to forgetfulness or "lapse of memory", but are of such a character as to strongly indicate that they were made with the intent to falsify the facts of the case in her own favor.

Both Mr. and Mrs. Harvey appeared personally before the trial court and gave their testimony

orally in open court. Indeed, every witness who testified in the case gave oral testimony in open court and in the presence of the Chancellor, and he had the advantage of listening to the witnesses themselves as they told their story, to watch their conduct on the stand and to look into their eyes to find the indicia of truth.

The Circuit Court of Appeals reviewed the decision of the trial court on the printed record of the testimony.

The opinion of the appellate court is also contained in full in the transcript (see pages 196 to 211) and in that opinion the appellate Judges fail to find a single error of law in the decision of the lower court. The appellate court's opinion also contains a long discussion of the facts of the case, and refers to the circumstances under which Mrs. Harvey changed her testimony. In conclusion the Judges say (Trans. pg. 210):

"Now, upon this record what are we to say *is the fact* as to whether Harvey gave this stock to his wife?"

And as to Harvey's testimony (Trans. pg. 210):

"The manner in which he carried the stock on his private books tends, undoubtedly, to an *impairment of the credit* of his statements as to the gift, because inconsistent therewith, but when all the attending circumstances are considered, we are convinced that the statements are true notwithstanding."

As to Mrs. Harvey's testimony the appellate court says (Trans. pg. 211):

"Mrs. Harvey's testimony that she received the stock from Harvey and that she continued in the sole possession with the two exceptions mentioned, we think *must be*

taken as the true statement of the fact. She first thought that she kept the stock in her safe deposit box at the bank, but she was afterwards convinced that she kept it in her own private safe,—a lapse of memory.” * * *
 “We cannot think that Mr. and Mrs. Harvey deliberately and corruptly devised the story about what took place and that they have sworn falsely for the sake of saving this stock from the wreck of Harvey’s business affairs for the wife’s benefit.”

From the foregoing it clearly appears that the appellate court reversed the decision of the trial court upon a question of fact pure and simple, and that this question of fact depended primarily upon the credit to be given to the testimony of Mr. and Mrs. Harvey. The trial court heard these two witnesses testify; the appellate court read their testimony cold in the record.

The first rule which we invoke in support of our appeal is that the appellate court was not warranted in setting aside the determination of the trial court as to the credit and weight which should be given to the testimony of the various witnesses.

In the equity suit of *Davis v. Schwartz*, 155 U. S. 637; 39 L. Ed. 293, Mr. Justice Brown, speaking for the Supreme Court said:

“As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under Revised Statutes, Sec. 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; *but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any test-*

mony consistent with the finding, *it must be treated as unassailable*. *Wiscart v. Dauchy*, 3 U. S. 3 Dall. 321, (1:619); *Bond v. Brown*, 53 U. S. 12 How. 254 (13:977); *Graham v. Bayne*, 59 U. S. 18 How. 60, 62 (15:265, 266); *Norris v. Jackson*, 76 U. S. 9 Wall. 125 (19:608); *Mercantile Mut. Ins. Co. v. Folsom*, 85 U. S. 18 Wall. 237, 249 (21:827); *The Abbotsford v. Johnson*, 98 U. S. 440 (25:168)."

McKinley Creek Mining Co. v. Alaska United Co., 183 U. S. 563, at 569.

"There was no finding of facts by the court, and assuming that we may look into the evidence, we find it conflicting as to who first discovered gold, Hackley or Sutherland. The court below evidently determined that Sutherland did, and, *having no test of the credibility of the witnesses*, we cannot pronounce that determination unsound."

In their opinion the appellate Judges admit that there was strong evidence to support the finding of the trial court that the conveyance of this property from Harvey to his wife was made in fraud of Harvey's creditors. A reading of the opinion of the *trial* court will show that the evidence to support this finding was literally overwhelming.

In the case of *Kimberly v. Arms*, 129 U. S. 512, the Supreme Court was called upon to consider a case where the findings of a special Master in Chancery were reversed by those of the appellate court. The Supreme Court says, page 523:

"Its findings, like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, *when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise.*"

* * * "We are, therefore, constrained to hold that the learned court below failed to give to the findings of the master the weight to which they were entitled, and

that they should have been treated as so far correct and binding as not to be disturbed, unless clearly in conflict with the weight of the evidence upon which they were made."

See also

Callahan v. Meyers, 128 U. S. 617, at 667.

The rule just referred to applies with particular force to a case, such as this, in which fraud is charged.

See

Sonnentheil v. Brewing Co., 172 U. S. 401, at 410.

"It may be said in general that there is no class of cases which are more peculiarly within the province of the jury than such as involve the existence of fraud. * * * Parties contemplating fraud frequently pursue such devious courses to conceal their designs, and resort to such subtle practices to mislead their unsecured creditors that the fraud becomes impossible to detect, unless the door be swung wide open for the admission of all testimony having any possible bearing upon the question. Facts which to the court might seem of no pertinence and be rejected as having no legal tendency to show knowledge of fraud, might be considered by the jury as significant and indicative of a guilty participation. Even negative evidence may sometimes have a positive value."

Of course the case at bar was not tried before a jury, but a Chancellor who listens to the oral evidence in order to determine a question of fraud should be allowed at least as much latitude in weighing the evidence as a jury would be allowed in the determination of a similar question.

Mr. Justice Story, in *Dade v. Irwin, Executor*, 2 How. 383; 11 L. Ed. 312, said:

"Besides, in cases of this sort, in the examination and *weighing of matters of fact, a court of equity performs the like functions as a jury*; and we should not incline, as an appellate court, to review the decision to which the court below arrived, unless under circumstances of a peculiar and urgent nature."

In the case of *Crawford v. Neal*, 144 U. S. 585; 36 L. Ed. 559, the United States Supreme Court, speaking through Mr. Chief Justice Fuller, said:

"We have patiently examined the evidence contained in the record, and it is impossible for us to reverse the decree for error or mistake in the conclusion of the master and the court, depending, as they do, upon the *weighing of conflicting testimony*, and entitled, as they are to every reasonable presumption in their favor."

NEW EQUITY RULES GOVERN THIS CASE.

Under the old system, it was customary to take the testimony before the Master in Chancery, and both the district Judge and the appellate Judges were in an equally disadvantageous position to pass upon the credibility of witnesses. The case at bar, however, was heard in open court by the district Judge personally. While the former equity rules were in effect, at the time of the trial the procedure actually followed was in accordance with new equity rule 46 of 1912, which provides:

"In all trials in equity, the testimony of witnesses shall be taken orally, in open court, except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence offered as in actions at law," etc.

This is a new rule abolishing the practice of former rule 67, and adopting the English practice

of taking oral testimony in open court, except where special cause exists for taking the testimony otherwise.

Prior to the adoption of this rule Mr. Justice Lurton submitted to the Lord Chancellor of England twelve questions in relation to equity procedure in England, and concerning the particular rule under discussion this question was propounded:

"How does the practice of hearing evidence orally in equity cases operate?"

ANSWER. It is now fully recognized in England that a judge is far more *likely to ascertain the truth if he sees and hears the witness himself*, and can *watch the course of the evidence, observe the demeanor of the witnesses, and form his own opinion of their intelligence, observation and credibility*. In our courts of appeal this is universally recognized, and it is only with reluctance and upon a clear conclusion that a court of appeal will differ with the opinion of the judge who has had these advantages." * * * "However, the matter may be as to costs, I am sure the practice of hearing evidence orally is incomparably better in all ways for that which is the main purpose, namely, the *ascertainment of truth*."

Hopkins' Federal Equity Rules, pg. 31.

Hence in England, operating under a similar rule, no decision can be found where a case has been reversed in which the trial Judge based his findings on conflicting evidence and the credibility of witnesses.

We respectfully submit that in this case there was an irreconcilable conflict between the evidence of the plaintiff and the evidence of the defendants. The defendant Mrs. Harvey was forced to admit that she had made false statements of facts material to the issues in her sworn testimony. The

testimony of the defendant's husband, who was the chief witness in her behalf was inconsistent with numerous written statements which he himself had made at a time when there was no possible motive for equivocation. The evidence of both of these witnesses is reviewed at length elsewhere in this brief; suffice it here to say that the trial Judge who heard these witnesses testify was competent to pass upon the question as to the weight which should be given to this testimony, and he determined that this testimony was not entitled to credit.

We respectfully submit that the Judges of the appellate court who did *not* hear these witnesses testify are not competent to reverse the finding of fact made by the trial Judge, who *did* hear and see them.

It is true that the appellate court makes the statement that much of the testimony was taken out of court and at the conclusion of its opinion, it says:

"We have not overlooked the rule invoked by counsel for appellee that the finding of the chancellor or the trial court upon conflicting evidence is presumably correct. In this case, however, not all the evidence was taken in open court. Indeed, the principal part of Mrs. Harvey's evidence was taken before the referee and read upon the trial."

The truth of the matter is that Mrs. Harvey changed her statements on the different occasions on which she testified and the testimony she gave before the referee in bankruptcy was introduced in evidence at the trial, only to show the very material conflict existing between the sworn statements made by her on these different occasions, and

her various inconsistent and irreconcilable claims. Mrs. Harvey herself appeared in open court and gave oral testimony at the time of the trial and so it was with every other witness in the case. The testimony which Mrs. Harvey gave before the referee in bankruptcy was not taken by way of deposition in the main case, but was merely testimony given by her as an ordinary witness at the meetings of Mr. Harvey's creditors in the bankruptcy court.

In reversing the findings of the trial Judge, the court of appeal wholly ignored the rules of law theretofore enunciated by it to the effect that findings of a trial Judge in an equity suit, based on the evidence of witnesses before him, and resulting in a substantial conflict with respect to the material issues, will not be set aside on appeal. It had announced this rule in the comparatively recent case of *Vanderbilt v. Bishop*, 199 Fed. 421, in which the court, speaking through Circuit Judge Ross (not sitting in the case at bar) said:

"The cause came on for trial before the judge of the court below, who heard the evidence and saw the witnesses. The trial resulted in a very substantial conflict in respect to the material issues presented by the pleadings. From the evidence the trial judge found the making of the written contract as alleged, and that it was made upon representations of material facts in regard to the character of the soil of the orchard, the number of varieties of trees therein planted, and the age of the trees, which representations the findings declare were false and fraudulent, and were so known to be by Vanderbilt when made, and that they were made by him and his agent for the purpose of deceiving the appellees, and to induce them to enter into the contract in question.

In the circumstances appearing, the general rule applicable to such cases precludes us from interfering with the findings of the trial court, having the advantages

alluded to; in addition to which it may be observed that the reading of the evidence disclosed to our minds certain suspicious circumstances strongly confirming the correctness of the conclusions reached by the court below, some of which we discovered, upon the subsequent reading of the opinion of the trial judge, impressed his mind as it does ours. It would, however, serve no useful purpose to go into those matters, so we forbear."

We understand the rule to be that in a case such as at present, the Supreme Court will review the evidence taken in the inferior court to ascertain whether there is substantial evidence to support the findings of the Chancellor who presided at the trial.

See

Foster Federal Practice, 5 Ed., Vol. 3, pg. 2359.

"Upon an appeal the appellate court regularly reviews the case upon the evidence taken in the inferior court and certified to it." Citing *Re Neagle*, 135 U. S. 1, at 42.

DID J. DOWNEY HARVEY ACTUALLY DELIVER TO HIS WIFE, THE DEFENDANT, 546 SHARES OF THE CAPITAL STOCK OF THE SHORE LINE INVESTMENT CO. IN THE YEAR 1905 WHEN HE WAS SOLVENT OR DID HE DELIVER THEM TO HER IN NOVEMBER, 1909, WHEN HE WAS INSOLVENT?

The question stated in the caption is the only question of fact in issue in this case. The defendant S. G. Harvey filed a verified answer to the plaintiff's bill of complaint but her attorney, in open court, waived all the issues raised by this answer except the single issue of fact as to the time when the certificates representing these 546 shares of capital

stock of the Shore Line Investment Co. were delivered to Mrs. Harvey. He says (Trans. pg. 86):

"So far as we can see, the only issue in the case is that issue of fact, did Mrs. Harvey own the stock, as she contends, in 1905, or is it true, as plaintiff contends, that she did not acquire it until 1909?"

Upon this issue of fact, both the trial court and the appellate court agreed that the plaintiff produced evidence which made out a *prima facie* case and that the burden of proof of showing the good faith of the transaction was thrown upon the defendant S. G. Harvey. The trial court say (Trans. pg. 45):

"That the delivery was made in 1905 is an affirmative defense, and is a matter which was peculiarly within the knowledge of Mr. and Mrs. Harvey. It has not been proven, and the evidence, in my opinion, preponderates against her, and against her contention."

The appellate court says (Trans. pg. 197):

"Harvey being the common source of title and his wife deraining title from him, if she has any, has the burden of establishing title in herself."

As both courts agree upon this proposition we shall make no attempt to discuss the evidence in the same order in which it was adduced at the trial of the case, but will discuss first the testimony of Mr. and Mrs. Harvey, the two defendants, whom we charge as parties to the fraudulent conveyance of this stock. These two witnesses are the only ones who have testified directly that the delivery of the stock was made by Harvey to his wife in the year 1905 when Harvey was solvent.

The settled law of the State of California is that a voluntary transfer of property made by the donor while insolvent, is not good as against his creditors. It is admitted on both sides that Mr. Harvey was solvent in 1905, when he and his wife claim that this gift was made and that he was insolvent in 1909, when the plaintiff in the action claims that the gift was made. Consequently, the time of the transfer is the decisive fact in the case, since, if it were not made until the latter date, it was made at a time when Mr. Harvey was admittedly insolvent and the transfer becomes fraudulent and void as to his creditors.

The uncontradicted evidence and admissions of the defendants establish the following facts, which we summarize:

1. Harvey purchased 546 shares of stock of the Shore Line Investment Co. with his own money in the year 1905 (Trans. pg. 151).

2. He gave this stock to his wife without other consideration than love and affection (Trans. pg. 133).

3. He himself says that at the time of the alleged gift, it was understood between him and his wife that he should hold the property in his own name for the purpose of showing people that he was a large stockholder in the corporation (Trans. pg. 150).

4. During the four and one-half years which elapsed between the time when Mr. Harvey claims

that he gave this stock to his wife and the time when it was transferred to her on the corporation books, Mrs. Harvey knew that her husband held the stock in his own name and acquiesced in her husband's exercise of all powers of dominion over it (Trans. pg. 135-136).

5. Up to the time of his insolvency in 1909 Harvey voted this stock as his own without a proxy; he signed corporation documents which stated that he was the owner and holder of it; he occupied corporation office by virtue of the qualification which his stock holding conferred upon him and was the active president of the concern (Trans. pg. 88-92).

6. Up to the time of his insolvency the stock was carried on Harvey's private books of account, his ledger, cash book, journal and trial balance book as his sole property (Trans. pg. 114-121).

7. Up to the time of his insolvency Mr. Harvey's bookkeepers at his dictation made numerous affirmative entries in his books by which Harvey's sole ownership of this stock were witnessed (Trans. pg. 121-123).

8. After the date of the alleged gift, Harvey had occasion to transfer part of the stock to one Folger and afterwards received back a new certificate from Folger. The new certificate was issued in *Harvey's name* and his wife was not known in either of these transactions (Trans. pg. 152).

9. Subsequent to his insolvency in 1909, Harvey's bookkeeper made this entry over his ledger account referring to the stock: "This stock was purchased for Mrs. Harvey and belongs to her", and this was the first notation of the gift made in Harvey's books (Trans. pg. 120).

10. After the date of the alleged gift, Harvey paid an assessment of \$5,460 on this stock out of his own personal funds. This amount was not charged to his wife on Harvey's books, though less than two months before he had paid a \$500 assessment on other stock belonging to her with which she was debited (Trans. pg. 31-32).

11. Harvey's secretary prepared, at his request, a detailed statement of his assets after the time of the alleged gift. The stock is included in this statement as Harvey's sole property, although the statement notes certain other small assets in which his wife has a half interest (Trans. pg. 107-108).

12. The stock was not transferred into Mrs. Harvey's name on the corporation books until ten days before the Ocean Shore Railway Co., of which her husband was president, went into a receiver's hands. Those proceedings were brought at the request of the railway company in which request Mr. Harvey joined (Trans. pg. 146-94).

13. The certificates of stock never bore Mrs. Harvey's name until they were transferred to her on the corporation books, but were merely endorsed in blank by her husband (Trans. pg. 153-176).

14. During the four and one-half years which elapsed between the time of the alleged gift and the transfer of the stock on the corporation books, no human being ever saw the stock in Mrs. Harvey's possession. Upon each of the four occasions upon which the stock was produced during this time it was found in the actual possession of Mr. Harvey himself (Trans. pg. 165, 98, 128, 152).

TESTIMONY OF DEFENDANT S. G. HARVEY.

The record shows that Mrs. S. G. Harvey gave testimony as to the conveyance of this stock on four occasions:—thrice at the meeting of the creditors before the referee in bankruptcy and thereafter in open court at the trial of this action.

The four days at which this testimony was given are respectively December 6, 1911, January 5, 1912, January 12, 1912, and April 4, 1912, and this difference in dates should be kept in mind for the reason that Mrs. Harvey changed her testimony in very material particulars on the several occasions upon which she gave it.

Her first statement of the case given before the referee in bankruptcy in December, 1905, was in part as follows (Trans. pg. 133):

"In 1905 Mr. Harvey told me he was going to give me some stock in the Shore Line Investment Company and he gave me *in June of that year* 300 shares. He told me as he acquired more he would give it to me. The reason that he kept the shares in his own name was because he was a big holder in the Ocean Shore

Railway Company and that would show his interest in the Shore Line Investment Company if he kept them in his name. In August he gave me 66 shares. In September he gave me 160 shares and 20 shares, and I put them in my box. In 1906, Mr. Harvey asked me for the certificate for 66 shares in order to make Mr. Folger a director of the company. In 1907, Mr. Harvey wrote me, I was then in New York, there was an assessment on the Shore Line Investment Company of \$10 which he paid and when I returned in July I gave him the certificates and he had the assessments endorsed on them. In December, Mr. Folger went out of the directorship of the Shore Line Investment Co. and I got the certificate endorsed by Mr. Folger, and gave it to Mr. Harvey. He gave me another one endorsed by himself and I put it in my box. Mr. Harvey gave me the stock in the respective months that I have named in 1905; I mean by that he gave me the certificates. The certificates in form were like common certificates, and they were endorsed by Mr. Harvey. I put the certificates in the safe deposit of the First National Bank, where I always have a box. *I remember the dates on which these certificates were given me, because I put them down on a memorandum."*

(Throughout this brief all italics are our own.)

On January 5, 1912, Mrs. Harvey further testified on this subject as follows (Trans. pg. 141):

"I received my first certificate of stock in the Shore Line Investment Company in June, 1905. I have a memorandum of those dates which I now hand you. *This memorandum shows that on June 26, 1905, I received 300 shares of stock in the Shore Line Investment Company.* I received these shares from Mr. Harvey. He delivered them to me on Webster Street and I thereupon put them in my safe."

* * * *

"During the years 1905-1910, I lived at 2555 Webster Street, in San Francisco and that was my only residence in the state" (Trans. pg. 137).

The memorandum which Mrs. Harvey made at these dates was introduced in evidence as Exhibit No. 9 and reads as follows (Trans. pg. 167):

"300 shares *delivered* June 26th, 1905;
 On August 22nd, 1905, received 40 shares;
 On August 22nd, 1905, received 26 shares;
 On September 22nd, 1905, received 180 shares."

After testifying positively and unequivocally that she received the certificate for 300 shares of this stock in her San Francisco apartment on June 26, 1905, and producing this written memorandum to support her testimony, Mrs. Harvey was forced to admit that she was not in San Francisco at all on the date when she claims to have received the stock, but was at the other side of the continent in New York City. This admission of Mrs. Harvey appears on page 173 of the transcript. Her daughter, also, directly affirms that Mrs. Harvey came to New York in June, 1905, to take her out of school. She concludes (Trans. pg. 174):

"On June 26, 1905, I think my mother was in New York."

It is true that at the trial of the case Mrs. Harvey changed her testimony in an attempt to make it appear that the dates on the memorandum were not the dates when the stock was delivered to her but were the dates when the stock was issued. This, although the certificates of stock carried on their face the date of issuance. She says (Trans. pg. 167):

"I made this at the beginning of the trial. The original memorandum which I made were on slips of paper which I pinned together, but they *were not the dates I received them*. I have not the slips. I made this memorandum and destroyed them. I kept the slips from 1905 up to the time I made this memorandum."

She further says (pg. 166):

"I took the dates of the certificates and not the dates of their receipt."

The foregoing evidence discloses that Mrs. Harvey directly made positive statements which were not true in fact, and also shows her disposition to change her testimony in order to meet the exigencies of the case as occasion required. First she testified positively on two occasions that the memorandum which she made was a memorandum of the date upon which the stock was delivered to her and upon the memorandum itself she writes: "300 shares delivered June 26th, 1905." Afterwards at the trial of the case, Mrs. Harvey, (forewarned, perhaps, of what she had to expect,) testifies that the date upon this memorandum was *not* the date when she received the certificate of stock, but was a memorandum of the date upon which the stock itself was issued although the memorandum itself uses the words "received" and "delivered". What possible occasion could Mrs. Harvey have for making a memorandum of the date upon which the stock was issued, if it is true, as she claims, that the certificates themselves were in her possession? These certificates carried on their face the date of issuance and to make a memorandum of such a fact under such circumstances would be an absurd act.

Moreover, Mrs. Harvey did not produce in evidence the original memoranda which she claims she made. After testifying at the first hearing before the referee that she had made memoranda of

these dates, she was requested to produce them. Instead of producing the original memoranda she claims that she made a copy of the originals and forthwith destroyed them. She produced in court only the copy which, admittedly, was made after the time when her original testimony was given. She says in this regard (Trans. pg. 167):

"The original memorandum which I made were on slips of paper which I pinned together * * *. I have not the slips. I made this memorandum and destroyed them."

The Judge of the trial court considered that these changes in Mrs. Harvey's testimony cast suspicion on her whole statement in the case. He says (Trans. pg. 44):

"It is difficult to avoid the suspicion that this change in Mrs. Harvey's testimony was made in order to escape the effect of the evidence showing that she was in New York in June, 1905, at the time she says she received the certificate for 300 shares from Mr. Harvey."

The foregoing is not the only material matter to which Mrs. Harvey gave positive testimony which she afterwards had to admit was untrue. On her original statement of the case before the referee in bankruptcy, Mrs. Harvey testified positively that she received this stock on the various dates in 1905, which she noted on her memorandum, and, as each certificate was received, placed it in her safe deposit box at the First National Bank at San Francisco (see testimony already quoted, transcript pages 133-134). She also testified as to many different occasions when she visited this safe deposit box to put in or take out these certificates of stock. After

her testimony was given and on December 19, 1911, the officials of the bank were subpoenaed to bring into court the records of the safe deposit company, showing Mrs. Harvey's visits to her box. At first the Safe Deposit Company failed to produce these records, but the referee continued the hearing and ordered their production. The company again objected to the records being produced and when the second objection was about to be overruled, Mrs. Harvey finally admitted that she had never kept the stock in the safe deposit box at all.

Commenting upon this phase of the case the trial Judge says (Trans. pg. 40 et seq.):

"The Safe Deposit Company strenuously objected to giving the testimony, but on December 19th, 1911, while Mr. Moffat, an official of the company, was *again* on the witness-stand and being questioned as to the same matter, Mr. Harvey produced a letter from Mrs. Harvey addressed to E. H. Williams, one of the attorneys, which in part is as follows:

'If you wish to learn from the safe deposit company the dates on which I visited my safe deposit box, I have no objection whatever, and am perfectly willing that the bank officials shall give you the information, and you may tell them so for me. I do not myself know the exact dates of my visits. I have, of course, been there a number of times since 1905, but I have at all times had a safe of my own wherever I have been living, whether here or at Monterey, and I kept many of my papers in these safes, and, *as I think it over, I am positive I kept my certificates of stock there instead of in my safe deposit box.*'

In a subsequent examination before the referee January 5th, 1912, Mrs. Harvey testified that she never had kept the Shore Line Investment Company stock in the safe deposit box, but it always rested in a portable safe which she kept first at the family home in San Francisco, and later in her rooms in the hotel at Monterey; that she had her valuable papers and jewels in this safe, and placed in the safe deposit box only a few letters, a number of antiques, several old

deeds, and the wills of herself and Mr. Harvey. Except herself, her maid, Miss Anderson alone had the combination to the safe. December 5th, Mrs. Harvey was certain that she deposited the stock in the safe deposit box in the First National Bank, but after the trustee made an effort to put in evidence the records of the bank disclosing the fact that Mrs. Harvey had never visited her box at all between June 1st and December 31st, 1905, and during that period there were but three admissions to the box, namely, July 15th, July 17th and November 8th, by Lizzie Anderson, Mrs. Harvey's maid, she remembered the stock had never been deposited elsewhere than in her portable safe. No record is kept of what was placed in that safe. No one but Mrs. Harvey ever had access to it, except Lizzie Anderson. Lizzie Anderson is not produced as a witness, and her absence is not accounted for.

* * * * *

It appears from the evidence that Mrs. Harvey visited her portable safe repeatedly during the time which intervened between June 1st, 1905, and the date of her testimony before the referee. On three different occasions in 1905 she placed stock therein. April 13th, 1907, Mr. Harvey paid the assessment on this stock and subsequently procured the certificates from Mrs. Harvey in order that the payments might be stamped on them. At that time, if her story is true, she must have taken the certificates from the portable safe, and later returned them. She certainly knew at that time that she had not placed them in the safe deposit box. In December, 1906, she gave the certificate for 66 shares to Mr. Harvey to be transferred to Mr. Folger; later it was returned. In October or November, 1909, she handed all the certificates to her husband to be given to Mr. Fay to enable him to negotiate a loan on all the stock of the corporation for the benefit of the company. The stock was returned to her by Mr. Harvey and later, on the 26th day of November, 1909, he again received it all from her, to be cancelled and transferred on the books of the company. During all this period her jewelry, and practically all her important papers were kept in this safe, and yet during the short interval of less than twenty-five months, between November 26th, 1909, and December 5th, 1911, the fact that the stock in question had been kept in the safe, and repeatedly taken therefrom and returned to that depository, was entirely forgotten. If she ever had the certificates in her possession, her habit of placing valuable documents in her safe, unaided by memory of specific circumstances, should have prompted a different answer.

It is unfortunate that she did not discover her error until the records of the safe deposit company were called for. It is equally unfortunate that her portable safe keeps no records, that no human being has testified that he ever saw the certificates in the safe or in her possession prior to November 26th, 1909, except her husband; that there is in evidence absolutely no contemporaneous record, either in the books and papers of the corporation, or of Mr. Harvey or Mrs. Harvey, or elsewhere, which intimates that Mrs. Harvey had possession of the stock certificates in question prior to November 26th, 1909."

Thus between June, 1905, and the time when Mrs. Harvey first gave her testimony in the bankruptcy court, she states that she handled these certificates of stock on ten separate occasions. Yet her memory as to where they were kept was entirely at fault. When the bank officials were first ordered to produce their records in order to disprove Mrs. Harvey's statement that she had kept this stock in her safe deposit box, objection was made and the records were not produced. A continuance was ordered, and, when, at last, the records were on the verge of being introduced in evidence, then, and only then, Mrs. Harvey notified the plaintiff's attorney that she was "mistaken" in the testimony which she had originally given. This delay in correcting her testimony until a time when it appeared certain that it would be demonstrated to be false shows her intention to profit by her false testimony, if she could.

Unquestionably the Chancellor was impressed with the fact that the story told by Mrs. Harvey was not entitled to credit and decided accordingly. He could hardly have been impressed otherwise. He

had the opportunity of actually seeing Mrs. Harvey as she gave her testimony on the stand and noticed many other discrepancies in her story which we have not attempted to refer to here. He rejected her whole testimony as not convincing and not sufficient to carry the burden of proof which was imposed upon her.

In the words of Lord Chelmsford in *Kierzkowski v. Dorion*, 5 Moore P. C. cases (N. S.) 397 at 427.

“There was no means of determining upon which occasion he had sworn truly or falsely. All that could properly be done was to regard his evidence as utterly unworthy of credit and to dismiss it without further consideration.”

Mrs. Harvey's explanation of the change in her testimony is this:

“When I was first on the witness stand, I testified that these certificates were in my box in the safe deposit. I had had no counsel or advice before attending that hearing.” (*Transl. Pg. 168.*)

It is not inappropriate to quote from the decision of the court in *Jordan v. Crickett*, 99 N. W. 164, a suit to set aside a fraudulent conveyance. There the plaintiff told an amazing yarn about his discovery of buried Spanish silver dollars in the Philippines, which he converted little by little into gold. He said he kept the identical gold for nearly three years in a chest in his father's house, and, the court said, but for his search for

“someone to whom he might sell his stock of goods in order to cheat his creditors, it might have been there still! Bureaus and chests as depositories for money have this advantage over banks; they keep no records. And the story as a whole may be said to defy contradiction, save

by its inherent improbability, its inconsistency with surrounding circumstances and the contradictory statements.
 * * * The entire tale has all the ear marks of a manufactured story and might well have been rejected by the jury as unworthy of belief."

So in this case after Mrs. Harvey's sworn testimony had been contradicted by the records of the safe deposit company, it may have occurred to her that portable safes keep no records, and that she might avoid future difficulties by changing her story accordingly.

In all jurisdictions it is uniformly held that if the evidence of a witness is unsatisfactory and unconvincing the trial court is not bound to accept it as a true statement of fact. A recent statement of this rule is contained in the case of *Roberts v. Roberts*, 168 Cal. 307, at 308 (1914):

"The findings of the court, and consequently its judgment, were against plaintiff upon all these matters. Upon his appeal he advances the argument that as he himself testified to the existence of these facts, and there was no opposing evidence, it was the duty of the court to have found in his favor and its finding against him was unsupported. But the court was not under compulsion to accept the testimony of plaintiff, and while from the nature of the case it would be difficult to present direct evidence against plaintiff's positive statements there were circumstances which manifestly to the mind of the court discredited plaintiff's evidence. Thus, as set forth by plaintiff in his original verified complaint, the nature of the deed was that it conveyed the fee to the plaintiff, reserving to the father a life estate, 'with the right to trade said property'. In his evidence he denies that the deed contained such a provision. He testifies that the deed was acknowledged by his father upon a day certain and before a named notary. No deed was acknowledged by his father before any notary upon that day, and the deed, which had a different date, and which was acknowledged, in so far as the notarial entry bears evidence of its contents, was not to the lands in question. Again he declares that

this deed was placed in escrow by his father at the Los Angeles National Bank with one F. G. Howes, an officer of the bank. Howes was dead at the time of the trial and evidence of the bank is that no such deed and no record of such an escrow could be found. We need not, however, pursue this further. Enough has been already set forth to show that the court was not under compulsion to accept the evidence of plaintiff."

TESTIMONY OF J. DOWNEY HARVEY.

J. Downey Harvey was made a defendant to this action, but he filed no answer to plaintiff's bill of complaint. He contented himself by appearing through attorneys other than those who represented his wife and filing a disclaimer of all interest in the controversy.

His wife, however, offered Mr. Harvey as the first and principal witness in her behalf and his testimony as to the conveyance of the stock is very full. He says in part (see trans. pg. 149):

"After the acquisition of the land, and the organization of the company, the stock was issued to me in June, 1905, one lot, another lot in August, 1905, and two lots in September, 1905. Stock certificates were issued to me and when I received them I endorsed them and gave them to Mrs. Harvey in conformity to what I told her I was going to do. I took them and handed them to her and told her that they were the certificates of the Shore Line Investment Company; that she was interested in as I had promised her, and I told her to keep them and take care of them, that they were of value and that they were endorsed. And I said to her that *the reason I am retaining them in my name is that I am very largely interested in the Ocean Shore Railroad, and these two companies are associated in the development of one another, one depends upon the success of the other. If I keep this stock in my name, which I will want to do, I will show the people that the Ocean Shore Railroad is interested in the success of this land*

company, and *that I am a large holder in it* and that at all times I will be ready to help out Granada as much as we can."

After making the pretended gift to Mrs. Harvey of this stock as related by him, Mr. Harvey retained it in his own name on the books of the corporation and, as the trial Judge says (see Trans. pg. 31):

"exercised a control and dominion over the stock as complete and effectual as though it were his individual property. At various meetings of the stockholders of the company at which he was present, he represented 546 shares of stock in his own name. At the meeting of April 25th, 1907, he represented these 546 shares in his own name, and also 1692 shares by proxies from fourteen several stockholders. As a stockholder he signed documents and resolutions of the company in which it was recited that the signers were owners and holders of certain shares of stock. The stock was carried in his private books of account—his journal, ledger and trial balance book—as his individual property."

Mr. Harvey also became president of the Shore Line Investment Co. by virtue of his apparent ownership of this stock and as president of that company he executed deeds and signed checks (see Trans. pg. 95) so that his interest in the corporation was made manifest both by the public records and by the circulation of the corporation checks throughout the business community. The transfer of the stock to Mrs. Harvey on the books of the corporation was not made until November 26, 1909, and just ten days thereafter, on December 6, 1909, a receivership proceeding was filed against the Ocean Shore Railway Company of which Mr. Harvey was president and the largest stockholder on the ground of the absolute insolvency of that concern. The

petition alleged that the railroad company had issued \$5,000,000 worth of bonds and that its assets were not sufficient to pay the amount of its bonded indebtedness;—that the company owed \$1,900,000 to unsecured creditors;—that the railroad which the corporation had constructed was unfinished; that the company had no funds to complete the work and that its franchises were in danger of forfeiture (see Trans. pg. 146-147).

This receivership proceeding was commenced at the request of the directors of the Ocean Shore Railroad Company in which request Mr. Harvey joined and the corporation's insolvency was discussed at the director's meeting before the time when the suit was brought (see Trans. pg. 94). It is an admitted fact that at this time, Mr. Harvey was a hopeless bankrupt and that all his assets were not sufficient in amount to pay even 2% on what he owed to his creditors. This allegation is contained in plaintiff's complaint (see Trans. pg. 6) and under the stipulation of defendant's counsel was admitted to be true.

At the very time when Mr. Harvey's insolvency was most apparent to him, and when it was about to be published to the world at large by means of the receivership proceeding against the railroad company which he fathered, this valuable stock in the Shore Line Investment Co. was transferred from him to his wife on the books of that corporation.

Up to that time Mrs. Harvey had never asserted her claim to the stock by a single act of authority

over it, she had never shown it to a single human being, and she had never spoken of her ownership of it except as she claims in a private conversation with her own daughter. But, when her husband's insolvency was about to be published to the world, she comes forward with the claim that the stock had been delivered to her more than four years before and that she had owned it for that long period of time.

One of the strong facts which shows that during this time, Mr. Harvey was the real as well as the apparent owner of the stock, is that it was carried on his own private books as his personal asset.

Harvey kept a bookkeeper and a system of books consisting of journal, ledger, cash book and trial balance book. There is no conflict of the evidence as to the effect of the entries in Mr. Harvey's books. These entries show that the stock in question belonged to Mr. Harvey. The claim of the defendant is that Mr. Harvey's books were negligently kept and that the entries therein were not made until long periods of time after the transactions had occurred.

This point is seriously considered by the appellate court in its opinion reversing the decision of the trial court.

It is incomprehensible to us how a delay in making an entry can explain away the effect of that entry as an affirmative statement of fact. Whether the entry is made promptly or not until after a con-

siderable lapse of time, it certainly should be a true and correct statement of fact when it is made. The entries in Mr. Harvey's books had this effect. They cover a period of more than four years and show positively that during all this time the stock was listed as his exclusive property. Many of these entries were made at a time long subsequent to that when he claims that he gave this stock to his wife, but all entries in his books, until long after his insolvency, are affirmative entries whose effect is to positively declare that this stock is the private property of J. Downey Harvey.

The defendants urge that it would be a very unusual thing for a husband to enter in his books gifts of property which he makes to his wife. They say that no man can reasonably be expected to keep an accurate record of transactions between himself and his wife. But Mr. Harvey did keep a record of transactions between himself and his wife, as the books themselves show. He kept a ledger account entitled, "Family Gifts and Allowances". In no other way could his books be made to balance, or an accurate statement of his business affairs be kept. His purpose in keeping books was to have an accurate record of all such things.

Moreover, Mrs. Harvey alleges that she made a memorandum of the gift at the time it was made although *she* kept no books and had no bookkeeper. This memorandum was supposed to have been made at the time of the gift, but, strangely enough, she claims to have destroyed the original when called upon to produce it and only the copy is in evidence.

However, if Mrs. Harvey expects us to believe her story of this memorandum, it seems strange for her to argue that it would be an unusual thing for her husband to make a record of it on his own books of account.

The Chancellor in his opinion devotes considerable space to his discussion of Harvey's books and we can do no better than quote from the opinion of the learned Judge on this subject (see Trans. pg. 30):

"Mr. Harvey testifies that he purchased this stock with his own money, and it is admitted there was no other consideration for the transfer to Mrs. Harvey than love and affection. He kept a set of private books in which were recorded, among other matters, transactions with his wife. These books are in evidence, and show the stock in question to have been his up to November 26th, 1909; prior to that date no mention was made in the books of any transfer or gift of this stock to his wife in June, 1905. In the ledger there is an account of 'family gifts and allowances'. In this account are recorded a number of gifts made by Harvey to his wife long prior to 1909, but there is no record of any gift of the shares of stock in question. Some time in 1909 or 1910, Mr. Harvey's bookkeeper Crosby wrote in the ledger, referring to the Shore Line Investment Company stock, 'This is the property of Mrs. H. and belongs to her'. The journal contained no entry in regard to this stock until after November 26th, 1909. In the book of trial balances, in February, November and December, 1906, January, 1907, February and March, 1908, and October, 1909, this stock is carried as the property of Mr. Harvey. This trial balance book shows that it was listed in the year 1905 as Harvey's stock, and in each and every succeeding year continuously, until and including October 1, 1909. In the succeeding trial balance of March 31, 1910, the stock is dropped for the first time from the list of Harvey's assets." * * *

"The stock was carried in his private books of account—his journal, ledger and trial balance book—as his individual property.

"Prior to November, 1909, there was not a suggestion in these books that the stock belonged to Mrs. Harvey. April 15th, 1907, Harvey paid an assessment of \$10

per share, or \$5,460, on this stock. This amount was not charged to Mrs. Harvey, though less than two months before he had paid a \$500 assessment on her Ocean Shore stock, with which she was debited. January 11th, 1907, he gave his wife \$200 in cash; this also was charged against her. Mr. Harvey explains this circumstance by saying that he intended that \$5,460 as a gift; but, notwithstanding this intention, this very \$5,460 appears among his assets in his trial balances for February, 1908, and March and October, 1909; and also in the statement of his affairs, which was prepared at his request by his bookkeeper, September 22d, 1907. Mr. Harvey attempts to avoid the obvious inference from these entries by saying that his attention was entirely engrossed with the affairs of the Ocean Shore Railway Company; that he 'seldom examined his ledger'; the bookkeepers kept the books as they saw fit; he was not in the habit of examining his trial balances—'I have no interest in them'; the purpose in maintaining bookkeepers was 'to write up my books once in a while, look after them, and mostly my check-book, which they took care of, and that I always had written up every month to know my condition'.

'Q. Did you examine your trial balances in 1906?

A. I have no recollection of it. Q. Did you ever have occasion to examine your trial balances during the years 1905, 1906, 1907, 1908, 1909 and 1910? A. I never knew of this book at all. Q. Did you ever examine the journal or ledger with respect to your Shore Line Investment Company stock? A. I never had occasion to. Q. Did you ever have occasion to look into your ledger during these years? A. Not in relation to the Shore Line Investment Company's stock. Q. Did you ever have occasion to look into your ledger and journal with respect to your other investments? A. I might have; I don't remember of having looked them up'.

It is hardly credible that Mr. Harvey should have been so indifferent as to the contents of his account-books. Mr. Wasserman, his bookkeeper prior to April, 1907, whose loyalty to Mr. Harvey is evident, says that he sometimes discussed entries in the books with Mr. Harvey; that it was Mr. Harvey's habit to give pencil memoranda in order that particular entries could be made, and that Mr. Harvey must have had knowledge of the entries in the trial balance book. Mr. Wasserman's statement, dated September 22d, 1907, is also a fact of significance bearing on Mr. Harvey's knowledge that in his books this stock was being carried as his asset, and not as the property of his wife. Mrs. Barron, a daughter of Mr. and Mrs. Harvey, testifying as to a

conversation with her mother which occurred in 1907, shows that Mrs. Harvey worried very often at that time about the affairs of the Ocean Shore Railway Company, of which Mr. Harvey was president, and in which he had invested heavily. The nature and cause of the worry is revealed in the daughter's question, 'I asked her if she didn't have anything of her own that would be very valuable'. It was earlier in this same year, under date of September 22d, that Mr. Wasserman wrote Mr. Harvey thus: 'In order to give you the statement you desire with regards your affairs, have gone thoroughly over your accounts.' Following this in the letter there is an itemized list of Mr. Harvey's liabilities, amounting to \$745,944.37; an itemized statement of his monthly interest charge, amounting to \$3,320.29, and also of his average monthly income, amounting to \$3,950.95. Following this there is a list of his assets among which is the item 'Santa Cruz Beach Company \$4,000, less half given Mrs. Harvey, \$2,000'. The letter concludes thus:

'Besides the above you should take into consideration the following:

Due from Rogers for three assessments paid	
Ocean Shore Stock secured by Stock and bonds	\$ 12,420.00
Ocean Shore Rwy. Co.—Cash put in not including assessment No. 3.....	283,613.17
Ocean Shore Bonds given in payment Assessment No. 3.....	55,000.00
Shore Line Inv. Co.....	23,610.00
Following Nevada mining ventures representing cash paid in:	
Forward	374,643.17
Ex. Bullfrog Banner.....	\$5,000
Midas Bullfrog.....	8,750
Bullfrog Banner less 1/2 given S. H. G. 1,500	
	<hr/>
	15,250.00
	<hr/>
	\$389,393.17
Assets on previous page.....	\$993,394.30
“ above.....	389,393.17
	<hr/>
	\$1,383,287.67

'Your liabilities are \$745,943.37 and your assets the above amount which show very well on paper but the trouble is the assets are given at a fair valuation, but if turned into cash if it was absolutely necessary to meet your obligations they would not bring that figure, you know.

'I would advise a careful study of the above with a view of disposing of all your assets that you possibly can at a valuation a little in advance of the above if possible, and paying off the debts as fast as possible. For although the liabilities are only a trifle over half the assets the interest and income about balance.

'If the various small properties and even the bigger ones could be turned into cash and applied on the indebtedness, I think everything will turn out for the best.

'I forgot to mention the amount of \$2,144.31 which the Ocean Shore owes you for expenses of Eastern trip when you tried to sell bonds last year.

'If you wish to see me about the above tomorrow please telephone me.'

The Ocean Shore Railway Company, which was soon to go into the hands of a receiver, was evidently a cause of anxiety, both to the husband and the wife. At practically the same time the wife, fearful that her husband's fortune would be wrecked, was worrying about her own future, and he was demanding from his bookkeeper a statement of his affairs. Under such circumstances it is unreasonable to suppose that he did not examine the statement with care when it was handed to him, and that he was not at the time fully apprised of the fact that the stock in question was being carried on his books as his own property. If this stock actually belonged to Mrs. Harvey, and the fact was known to Mr. Wasserman as well as to Mr. Harvey, why was it not excluded from the list of assets, as was the half interest in the Santa Cruz Beach Company, 'given Mrs. H.?'

Harvey's claim that he was not familiar with the entries in his own books is directly contradicted by still other facts. Harvey's bookkeeper, Wasserman, testifies that Harvey himself had written in pencil in his cash book after an entry showing the purchase of Shore Line Investment Company stock in September, 1905, the words "property of S. G. Harvey". He further says (Trans. pg. 118):

"This entry is an item which I would go over in making up my monthly statements of trial balances. I have no idea when the particular entry was made. I do not know whether it was made before I left Mr. Harvey's employ or not. I never saw it."

The fact that Mr. Harvey did go over the entries in his cash book and made pencil annotations after them, shows that he was personally familiar with the contents of his books and was much concerned with the effect of these entries as evidence against him and his wife. The entry after which he wrote in pencil "property of S. G. Harvey" was an entry which had particular reference to the very transaction here in question. Mr. Wasserman does not know when Harvey made his annotation to this entry and says he never saw it. Harvey, in his testimony, avoids all reference to the time when it was made. It is a legitimate inference from this evidence that Mr. Harvey well knew the meaning of the entries in his books, and that he was willing, by means of these pencil annotations, to alter their effect as evidence.

A contention similar to Harvey's was made by the defendant in the case of *National Bank v. Hobbs*, 118 Fed. 627, at 636, and the court said:

"Nor can it be with justice concluded in this case that the members of the firm of Hobbs & Tucker were unaware of the importance of these books. * * *

It would be unjustifiable to the court at this time to accept this indeterminate explanation, confronted as it is by the clear-cut evidence afforded by the *contemporaneous entries* on the *books*, made at a time when there was no opportunity for mistake and no motive to recharge or otherwise falsify the account."

The testimony of both Mr. and Mrs. Harvey is thoroughly untrustworthy and is opposed to the great weight of the evidence in the case and justifies the conclusion of the trial court that the story of neither of these witnesses is entitled to credence.

We quote from the case of *Wooster v. Trowbridge*, 115 Fed. 731:

"The foundation and stability of our jurisprudence depends upon the ascertainment of the truth in all controverted matters. Well-settled rules afford guidance in cases, where the evidence is in hopeless conflict, and assuredly such is the case at bar. True, the transactions to which it relates occurred fully a score of years ago; and, while testimony of this nature may not be wilfully false, yet it must be the subject of the severest scrutiny. Whether it be wilfully false, or that of a forgetful, weak, or vacillatory man of 69 years, the standard of proof must be supplied which the law requires to satisfy the mind of the court before relief can be granted."

THE EVIDENCE OFFERED BY THE DEFENDANT TO CORROBORATE HER TESTIMONY IS ENTITLED TO LITTLE IF ANY CONSIDERATION, AS THE CORROBORATING WITNESSES TESTIFY TO SELF-SERVING DECLARATIONS ONLY.

Over the objection of plaintiff five witnesses were permitted to testify as to declarations made to them by either Mr. or Mrs. Harvey to the effect that the stock in question was Mrs. Harvey's property. This is practically the only evidence offered by Mrs. Harvey to corroborate her testimony and that of her husband.

One of these witnesses was Mrs. Harvey's daughter, Mrs. Ward Barron, who testified that in the winter of 1907 her mother, in a private conversation, told her that

"she had shares in the Shore Line Investment Company and those, Mr. Harvey told her, were going to be very valuable some day" (Trans. pg. 174).

The other four "corroborating" witnesses testified that at various times Mr. Harvey told them

that he had given the Shore Line Investment Company stock to Mrs. Harvey. These four witnesses were all intimate friends of Mr. Harvey. Two of them were his confidential bookkeepers, another was his business associate and confidential adviser and the fourth was the manager of the Shore Line Investment Company of which concern Mr. Harvey was president.

There is a grave question as to whether this kind of testimony was admissible in evidence at all as it consisted of self-serving declarations and hearsay, and was all objected to when offered at the trial. See *Horwitz-Jones, Commentaries on Evidence*, (Blue Book) Volume 2, Sec. 235a.

"It would be obviously unsafe if parties to litigation were without restriction allowed to support their claims by proving their own statements made out of court. Such a practice would be open not only to all the objections which exist against the admission of hearsay in general, but would also open the door to fraud and to the fabrication of testimony."

See

Holt v. Utah, 110 U. S. 574 at 581.

"Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible."

Moreover in the case at bar there were circumstances which threw grave suspicion upon the testimony of at least two of these corroborating witnesses. The bookkeepers who testified to these self-serving declarations admit that they made contemporaneous written entries in Mr. Harvey's

books which are inconsistent with the oral statements which (so they claim) Mr. Harvey made to them. Even Mr. Corbet admits that he advised Mr. Harvey to sign as owner of these shares of stock after the time that he claims to have been informed that Harvey had given the stock to his wife. Such testimony is of doubtful value at best and it is the province of the trial Judge, who heard the witnesses testify, to determine its weight.

TESTIMONY OF EDWIN ADAMS WASSERMAN.

Mr. Wasserman testified:

"I know Mr. Harvey very well. I was his secretary for about ten years and kept his books most of that time" (Trans. pg. 99).

He then goes on to say (Trans. pg. 113):

"I cannot remember any particular distinct conversation, but I have a very good recollection of it, not a decided recollection, but a distinct one, that Mr. Harvey mentioned to me at some time or other that this property of this Shore Line Investment Company was Mrs. Harvey's property, exactly when, I could not tell you, because I don't know, it is just a recollection; it is not distinct as to time, and I cannot tell you where it was at all, nor the place, nor anything further than that there was some such subject matter mentioned by Mr. Harvey."

The trial Judge in his opinion refers to Mr. Wasserman as a man "whose loyalty to Mr. Harvey is evident" (Trans. pg. 33). And it is apparent from a reading of the transcript that Mr. Wasserman did his best to make his testimony favor the

defendants. Mr. Wasserman first testified before the referee in bankruptcy and on the trial of the case was asked many questions which were substantially the same as those which were asked him before the referee in bankruptcy. His answers at the trial were materially different from the answers originally made and the difference always favored Mrs. Harvey. A reading of the record, pages 109 and 110, clearly shows the importance of these changes in his testimony.

Mr. Wasserman's attention was called to his testimony as originally given and at last he gave up the ghost and said "it is pretty hard to say one thing at one time and one at another; so I presume it was my statement" (Trans. pg. 110).

But the most satisfactory impeachment of Mr. Wasserman's testimony comes from the fact that he himself made numerous entries in Mr. Harvey's books showing this stock as Mr. Harvey's private property. Mr. Wasserman kept a separate account in Mr. Harvey's books of "Family Gifts and Allowances" in which he registered all gifts made by Harvey to his wife, and he made entries in this account as late as September, 1907. Yet he never made an entry of the gift of this particular stock to Mrs. Harvey, although it is claimed that the gift was made in the year 1905. He has no explanation to offer as to why he failed to enter this stock as Mrs. Harvey's property, if he was really informed to that effect.

TESTIMONY OF JAMES W. CROSBY.

Mr. Crosby testified:

"I was the bookkeeper for J. Downey Harvey from the Spring of 1908 until practically the present time" (Trans. pg. 119).

He further testified (Trans. pg. 128) that when Mr. Harvey paid the assessment on this stock he had a conversation with him. He said:

"I do not recall Mr. Harvey's wording, but I understood that the stock belonged to Mrs. Harvey, I do not know whether he said the stock belonged to Mrs. Harvey in so many words or not. He told me the stock was Mrs. Harvey's at that time."

The time that Mr. Crosby refers to is April, 1907. Yet he like Mr. Wasserman made entries in Mr. Harvey's books long after that date in which he registered this stock as Harvey's private property. The trial Judge says (Trans. pg. 36):

"Much stress is placed on Mr. Crosby's testimony that Mr. Harvey told him in the spring of 1907 the stock was Mrs. Harvey's. The weight to be given this testimony, as well as the weight which Mr. Crosby himself attributed to the statement made by Mr. Harvey, must be considered in connection with the fact that as Mr. Harvey's bookkeeper after April, 1907, he continued to include this very stock among Mr. Harvey's assets in the trial balances prepared by him, of February, 1908, and March and October, 1909. It was not until March, 1910, after the stock had actually been transferred to Mrs. Harvey on the books of the corporation, and after Mr. Harvey's insolvency was apparent, that Crosby entered on Mr. Harvey's books the statement that this stock had been purchased four years before for Mrs. Harvey."

TESTIMONY OF BURKE CORBET.

Mr. Burke Corbet was the secretary of the Shore Line Investment Company of which Mr. Harvey

was president (Trans. pg. 86). He says (Trans. pg. 93):

"I have never acted as attorney for J. Downey Harvey nor has he ever paid me any counsel or attorney's fees. I have consulted with him in a friendly way on some of his matters."

He further testifies (pg. 98):

"At all of those times *before* any stock was ever issued in the name of Mr. Harvey, he stated to me that he *had given* the stock to Mrs. Harvey. After the stock was issued, we discussed it a number of times, and he told me he had given it to Mrs. Harvey. At the time that I drafted the document above referred to, and at the several times when Mr. Harvey voted or acted in the corporation as a stockholder, I knew the matters I have just testified to. The reason that I, knowing these facts permitted him to sign a document, 'we, the undersigned owners and holders of the number of shares of stock,' etc., was because the stock showed on the books of the corporation in Mr. Harvey's name, and I deemed it advisable, in order to make the thing show as being a legal document, that it be signed by Mr. Harvey, and I advised Mr. Harvey at that time to sign the document."

He also testifies (pg. 97):

"He said to me at that time that he was buying the stock and was giving it to Mrs. Harvey. I suggested to him then that *if this was true* the stock should be issued in Mrs. Harvey's name. Mr. Harvey said that he preferred to have it issued in his own name because he wanted to be a Director of the corporation, and wanted to participate actively in the management of the corporation."

Mr. Corbet, like Mr. Harvey's bookkeepers, was busy preparing documents which witnessed the fact that Mr. Harvey was the sole owner and holder of this property long after the time when he well knew the fact to be (if his testimony is to be believed) that Mr. Harvey was not the owner of this stock. Mr. Corbet may have thought very naturally

and very properly that if the stock really belonged to Mrs. Harvey the certificates would have been issued in her name, and, as the certificates were not issued in her name, that her husband had never executed his intention of delivering to her these certificates of stock. Mr. Corbet himself says that he advised Mr. Harvey to sign the document which contained the statement that J. Downey Harvey was the owner of 546 shares of the Shore Line Investment Co. We think the facts which were convincing to Mr. Corbet should be convincing to a court in equity, and that stock which belonged to Mr. Harvey for all corporate purposes should be made subject to the claims of his creditors now that he is insolvent.

TESTIMONY OF CHARLES W. FAY.

The last of the corroborating witnesses was Mr. Charles W. Fay, the general manager of the Shore Line Investment Co. He says (Trans. pg. 164):

"I met Mr. Harvey very frequently. My business called me into consultation with him constantly, almost every day. * * * Mr. Harvey told me at this time that this stock was Mrs. Harvey's. This was in 1906."

Also page 165, referring to the year 1909:

"I called on Mr. Harvey and asked him for the stock held in this company, explaining my purpose. He said he would get the stock; that it was Mrs. Harvey's stock."

And again at page 175:

"The earliest date that I saw these certificates was the latter part of October or the first part of November, 1909. They were not endorsed to Mrs. Harvey, but simply in blank, as I recall them."

As the trial was held in 1912 Mr. Fay's recollection of a conversation in 1906 may have been somewhat uncertain. He gives no particulars as to the conversation, but contents himself with a bald statement of it in a dozen words.

The conversations which Mr. Fay had with Mr. Harvey in 1909 were had within a month of the time when the stock was transferred to Mrs. Harvey on the books of the corporation, and at a time when Mr. Harvey was already insolvent. As to this evidence the trial Judge says (Trans. pg. 37):

"The statements to Mr. Fay in October and November, 1909, were made within a few days, or weeks at most, of the time when the stock was transferred to Mrs. Harvey on the corporate books. Then Mr. Harvey was insolvent, and this fact was undoubtedly known to both husband and wife. His statement under such conditions may have been inspired by a desire to protect his wife. Certainly it is entitled to little weight in determining whether Mrs. Harvey had had control and exclusive possession of the stock certificates for the previous four years."

We have reviewed this corroborating evidence at such length because we desire to have it placed before the court with literal accuracy. These self-serving declarations were considered by the appellate court to constitute evidence of such great weight that they required a reversal of the decision of the trial court. We believe that the Court of Appeals was in error in so deciding.

In the case of *Blanc v. Connor*, 167 Cal. 719 (May, 1914) at 722, the court holds that the testimony of a single witness which is not satisfactory

in itself may be rejected even when supported by corroborating testimony of four other witnesses.

The court says:

"It is asserted by counsel for plaintiff that, unless the court is prepared to impute perjury to four uncontradicted witnesses, it cannot uphold the finding of the trial court that no contract was made. * * * The position of counsel for respondents is this: There is no witness to the alleged contract save the plaintiff himself; the other witnesses did not say there was a contract, or that Mrs. Blanc admitted the existence of an agreement to devise property to Stewart Blanc, but they did say merely that she expressed an intention of leaving him her property on Jackson Street by will. * * * It is asserted that this is a class of cases sometimes arising in fraud and abounding in perjury, and although disclaiming any thought that the instant case is so tainted, counsel contend that the court was justified in scrutinizing the testimony very carefully and refusing to accept it as proof of the contract unless it presented a very strong showing that the agreement was made substantially as alleged. It is true that courts are very slow to overturn findings of fact made by a jury and a fortiori those made by a court acting without a jury, *even when contrary statements which are uncontradicted appear in the testimony of witnesses*. The rule was thus stated in *Davis v. Judson*, 159 Cal. 128, (113 Pac. 150), in which Mr. Justice Lorigan, delivering the opinion of this department, said: 'While it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, ~~this~~ rule has its exceptions. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness's own statement of the transaction; or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity; the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to disregard his positive testimony as to a particular fact; and as it is *within the province of the trial court* to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its findings or conclusion denying the testimony credence, unless it appears that there are no

matters or circumstances which at all impair its accuracy.' "

In the instant case the corroborating evidence is merely the repetition of declarations made by the defendants which tend to bear out their story in the case. Such statements do not directly prove the fact in issue. None of the corroborating witnesses saw this stock delivered to Mrs. Harvey, and none of them swear that Mr. Harvey stated that he had actually delivered the certificates of stock to his wife. The trial Judge was impressed by this feature of the case when he said (Trans. pg. 37) :

"These declarations to the effect that the stock was Mrs. Harvey's are of little assistance in determining at what time the stock was actually delivered to her. The statements may be entirely consistent with plaintiff's contention that the stock was not actually delivered until November 26th, 1909."

To the same effect see *Guthrie v. Carney*, 19 Cal. App. 144, at 152:

"Verbal or written notice of sale of personal property given to an individual or any number of individuals unaccompanied by an immediate and actual change in the status of the property, is not equivalent to delivery of possession; and *Guthrie's* assertion that he purchased the property in question was but a mere conclusion and a self serving declaration, which had no legitimate tendency to prove a delivery. (*Sequeria v. Collins*, 153 Cal. 426, (95 Pac. 876); see opinion of Beatty, C. J., in *Hunt v. Hammel*, 142 Cal. 461, (76 Pac. 378)."

The testimony of Burke Corbet illustrates this defect. He says (Trans. pg. 98):

"Before any stock was ever issued in the name of Mr. Harvey, he stated to me that he *had given* the stock to Mrs. Harvey."

UNACCOUNTED ABSENCE OF OTHER CORROBORATING
WITNESSES.

The trial Judge says (Trans. pg. 41) that Mrs. Harvey, after first testifying that she kept this stock in her safe deposit box, was forced to change her recollection and testify that she kept it in a portable safe.

"No record was kept of what was placed in that safe. No one but Mrs. Harvey ever had access to it, except Lizzie Anderson. Lizzie Anderson is not produced as a witness and her absence is not accounted for."

So J. A. Folger, the man to whom was transferred some of this stock in 1906 and who transferred it back to Harvey in 1907, was not called to the stand by the defendants to explain that transaction.

MRS. HARVEY ADMITS THAT SHE PERMITTED HER HUSBAND TO RETAIN THE APPARENT TITLE TO THE 546 SHARES OF STOCK, AND THUS CLOTHED HIM WITH A FALSE CREDIT.

The defendants, themselves, state that when Mr. Harvey agreed (as they claim) to give his wife the stock which he would acquire in the Shore Line Investment Co. he expressly stipulated, as a condition of the gift, that he should be permitted to retain the stock in his name, that is, retain the apparent title to it.

Testifying as a witness for his wife Mr. Harvey thus relates the conversation (Trans. pg. 149):

"And I said to her that the reason *I am retaining them in my name* is that I am very largely interested

in the Ocean Shore Railroad, and these two companies are associated in the development of one another, one depends upon the success of the other. *If I keep this stock in my name, which I will want to do, I will show the people that the Ocean Shore Railroad is interested in the success of this land company, and that I am a large holder in it and that at all times I will be ready to help out Granada as much as we can.*"

Mrs. Harvey says about this same transaction (Trans. pg. 133):

"The reason that he kept the shares in his own name was because he was a big holder in the Ocean Shore Railway Company and that would show his interest in the Shore Line Investment Company, if he kept them in his name."

Mr. Burke Corbet testifies that Mr. Harvey was a director and president of the corporation (Trans. pg. 88) and that he at all times voted the shares of stock in his own name without a proxy, although, he secured proxies from other stockholders (Trans. pg. 90).

It also appears that Mr. Harvey signed instruments wherein it was recited that he was the owner and holder of the 546 shares of stock here in question (Trans. pg. 91 and 92). By virtue of his office as president of the corporation Mr. Harvey was authorized to sign checks and deeds and was active in the performance of his official duties (see Trans. pg. 95).

The deeds which Mr. Harvey signed became a matter of public record; the checks which he signed were circulated in the business community, and the active performance of his duties as president of the corporation effectively held Mr. Harvey

up before the public as a person having heavy interests in the corporation which he so represented. By this means his object of "showing the people" that he was a "large holder" in the Shore Line Investment Co. was accomplished. His wife says (Trans. pg. 135):

"As a matter of fact, I delivered all those shares of stock according to Mr. Harvey's directions. There was not much direction given me, but I was at all times willing to act in accordance with his suggestion."

Mrs. Harvey further says (Trans. pg. 136):

"I always knew that the stock stood in Mr. Harvey's name on the books of the corporation and was familiar with the fact that he was acting as president of the company and was managing its affairs."

Mrs. Harvey's counsel at the opening of the trial of this case admitted the truth of all the facts pleaded in plaintiff's complaint except those relating to the time of the transfer of this stock.

He admitted among other things that Mr. Harvey was insolvent on the 26th day of November, 1909, when for the first time this particular stock was transferred into Mrs. Harvey's name on the corporation books. He also admitted that at the time this suit was commenced Mr. Harvey was hopelessly insolvent in that he owed debts of upwards of \$200,000, and that his assets would pay less than two per cent of the amount of his indebtedness.

Under the circumstances here disclosed, who should be entitled to this stock? Mr. Harvey's wife who, if her story is true, permitted her husband to hold himself out to the public as the owner of this

asset until a time long after he had become hopelessly insolvent,—or Mr. Harvey's creditors who have been misled into giving him credit because they deemed him a solvent man. The Supreme Court has very lately held that those who help to give false credit to an insolvent debtor have no rights superior to those of his creditors.

See

National Bank of Athens v. Shackelford,
(Dec. 15, 1915) U. S. Supreme Court Adv.
Op. No. 2, Lawyers' Ed. 17.

"The evidence in this case tends strongly to show that, although the mortgage given by the bankrupt to the appellant was for a valid consideration and effective as between the parties thereto, the same by understanding, if not agreement, was withheld from record so as not to affect the mortgagor's credit; and we therefore concur with the trial judge in his disposition of the case."

Also,

Moore v. Page, 111 U. S. 117, at 119:

"Whilst property thus conveyed as a settlement upon the wife may be held as her separate estate, beyond the control of her husband, it is of the utmost importance to prevent others from being misled into giving credit to him upon the property, that it should not be mingled up and confounded with that which he retains, or left under his control and management without evidence or notice by record that it belongs to her. Where it is so mingled or such notice is not given, his conveyance will be open to suspicion that it was in fact designed as a cover to schemes of fraud."

The language which is used in the passage just quoted is literally applicable to the facts in the case at bar as stated by defendants themselves. Here the wife did leave her property under the sole control and management of her husband and acquiesced

in his continuous exercise of all the powers of dominion over this property. No notice of record or otherwise was given of her interest in this property. Her husband and he alone controlled this property. He held the record title to it in his own name,—signed documents with his wife's acquiescence in which he stated that he was the owner and holder of the stock; held corporation office by virtue of his ownership of this property, and did all this for the avowed purpose of "showing the people" that he was a "large holder" in the corporation.

THE GIFT OF THESE SHARES BY HARVEY TO HIS WIFE WAS NOT ACCOMPANIED BY AN ACTUAL AND CONTINUOUS CHANGE OF POSSESSION AND THEREFORE IS VOID AS TO HIS CREDITORS.

The rule that a transfer of personal property must be accompanied by immediate delivery and actual and continued change of possession in order to be good as against creditors of the donor is almost universally recognized. We will make no effort to quote the almost innumerable cases throughout the various jurisdictions of the United States which support this rule. Suffice it to say that the rule is established in California both by statutory enactment and court decision.

Section 3440, Civil Code, State of California, provides:

"Every transfer of personal property * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an

actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors.
 * * *

This section has been construed in a large number of cases. It originally came before the Supreme Court of this state in *Stevens v. Irwin*, 15 Cal. 503, and this authority has been uniformly upheld by the Supreme Court of California ever since.

The court said:

"The delivery must be made of the property; the vendee must take actual possession; that possession must be *open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee*. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous—not taken to be surrendered back again—not formal, but substantial."

In *Murphy v. Mulgrew*, 102 Cal. 547, it is said:

"From the evidence of the plaintiff it will be perceived that no actual change of possession of this property took place at the time of the delivery of the bill of sale; but, on the contrary, in all its surroundings it remained entirely in statu quo. Mrs. Murphy attempts to escape the legal effect of the foregoing evidence by the claim that she had appointed her husband her agent to take the possession and control of the horses for her, and, as such agent, his possession was her possession, but there is nothing to be urged in favor of such a contention. Both the letter and the spirit of the law contained in section 3440 would be defeated by the recognition of such a principle. The object of the statute is to require notice to the world of the transfer of personal property, in order that men may be able to deal with each other upon equal terms, and from a common level. The efficacy of the statute would be entirely destroyed if the vendor were allowed to remain in possession of the property as the agent of the vendee, in the absence of any notice to the world of such a change of conditions. A practice of that kind would be in direct conflict with the terms of the statute itself."

The rule above stated has direct application to a transfer of stock of corporations. Under Section 324 of the Civil Code of California, shares of stock in a corporation are declared to be personal property.

"Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock * * * are personal property, and may be transferred by indorsement by signature of the proprietor * * * and the delivery of the certificate; but such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation * * *."

The case of *Tregear v. Etiwanda Water Co.*, 76 Cal. 537, also holds that shares of stock in a corporation are personal property and that they are subject to the rule of Section 3440 of the Civil Code which requires immediate delivery and actual and continuous change of possession.

It is contended by the defendant that this rule has no application to a case in which the certificates of stock are actually handed by the donor to the donee as in such a case there is immediate delivery and actual and continuous change of possession.

Certificates of stock in a corporation are not actually the stock, but are merely the symbolic representations of the stock, that is, they are the symbols which represent the intangible thing, the stock itself. This fact is recognized in the case of *Film Producers v. Jordan*, 51 California Decisions, page 35, (decided January 8, 1916). In that case the court says in part:

"Shares of stock are but representatives of value. They are *but paper evidence of ownership* of the capital stock of the corporation, and that ownership is precisely such as the share itself declares it to be."

See also,

Payne v. Eliot, 54 Cal. 339, at 342:

"It is, therefore, the 'shares of stock' which constitute the property which belongs to the shareholder. Otherwise, the property would be in the certificate; but *the certificate is only evidence of the property*; and it is not the only evidence for a transfer on the books of the corporation, without the issuance of a certificate, vests title in the shareholder: the certificate is, therefore, but additional evidence of title."

As a certificate of stock is merely the symbol, or the representative of the real thing itself, a delivery of a certificate is merely a symbolic delivery of the property to be transferred, similar to a delivery of a warehouse receipt where the goods themselves are deposited in the warehouse.

It is a well recognized rule that many types of personal property are not capable of manual delivery. Heavy, bulky articles cannot be delivered from hand to hand and, consequently, a symbolic delivery of the property given is universally held to be a sufficient delivery of the property itself. Symbolic deliveries of this kind are sufficient, in general, to comply with the statutory requirement of actual delivery. However, there must not only be delivery of the property, but actual and continued change of possession. It would be strange to hold that a donor might make a symbolic delivery of the representation of property and still retain the actual possession of the property itself without making the transfer void as to creditors.

That is exactly what Harvey has done in this case, if his own and wife's story of the transaction be true. He delivered to his wife the symbol of the property

which was the certificate of shares of stock in the corporation, but this delivery was made in secret between themselves and the understanding was that the public should be led to believe that Mr. Harvey was the real owner of the property itself. In pursuance of this understanding, Mr. Harvey exercised full and complete power and dominion over the property itself. The shares of stock were in his hands to be voted as he pleased. When a part of them were transferred to Mr. Folger, Mr. Harvey made the transfer, producing a certificate endorsed by himself in blank and ordering it to be cancelled and reissued in Mr. Folger's name. When the stock was returned by Folger, it was returned to Harvey and reissued to Harvey in his own name,—his wife not being recognized in the transaction. Harvey paid the assessment on the stock. Harvey signed corporation papers which recited that he was the owner and holder of it. Harvey occupied corporation offices by virtue of the ownership of these very shares. *And on every occasion where it was necessary to produce the certificates, they were produced by Harvey himself.* A transfer made under these circumstances is not accompanied by actual and continuous change of possession. It is made in a manner opposed to, and designed to oppose, the very purpose of the act which requires actual and continuous change of possession. For that act is designed to require such transfers to be made in such a manner that notice of the same is given to the public generally.

The case is the same as though goods were located in the warehouse and a delivery of the goods was

accomplished by endorsing over the warehouse receipt. Such a delivery in general would be sufficient. But if it were proved beyond contradiction that after the delivery was accomplished the former owner of the goods was permitted by the new owner to exercise every act of dominion over the goods themselves, the transfer would be held void. Suppose the new owner permitted his donor, after delivery of the warehouse receipt, to dispose of a portion of the goods covered by the receipt and afterwards to receive back the goods and to take a new receipt in his own name (as in this case, Harvey turned over part of this stock to Folger and afterwards received a new certificate from Folger issued in his own name). That very act of dominion over the chattels themselves would be sufficient to prove conclusively that the symbolic delivery of the warehouse receipt was not a real delivery of the property, but merely a fictitious delivery; that while the symbol of the thing had been actually delivered, the things themselves had been retained under the control of the original owner.

Conclusion.

In conclusion, we submit that the evidence in this case shows conclusively a fraudulent transfer of this stock. It has all the badges and ear-marks of fraud. It was made by a husband to his wife. The public evidence of the transfer appears after the husband is insolvent. The defense is that the actual transfer was secretly made at a time when the husband was

solvent. Mrs. Harvey, when subpoenaed to testify before the referee, testified that the actual deliveries of the certificates took place at specified times in 1905. She attempts to give weight to her testimony by stating that she took the certificates as and when delivered and immediately placed them in her safe deposit box. The officials of the safe deposit company were subpoenaed to produce its books. The husband had been a stockholder in this company and its attorneys appear and vigorously protest against the production of such books. The protest is overruled and at a subsequent date the books are produced before the referee, and again objection is made to their introduction in evidence. When finally all objections are overruled Mrs. Harvey's husband produces a letter from her stating that she was mistaken when she testified that she placed her certificates in her safe deposit box; and the books, upon inspection, show that she did not do so.

Yet the evidence in this case shows that between June, 1905, and November, 1909, if her story be true, she must have handled these certificates at least ten times.

After this story was shown to be false, she testified that, when she received the certificates, she made memoranda of the dates upon which they were *delivered* to her. Upon the trial of this case it was shown that at the time her purported memoranda showed a delivery to her in San Francisco of one of these certificates, she was, in reality, in New York City. She is forced again by the exigencies of the

case to change her testimony, and she then says that the memoranda were not of the dates when the certificates were delivered to her, but *were merely the dates of the certificates themselves*. This in face of the fact that the memoranda purport to recite that the certificates were "delivered" or "received" on the specified dates.

Furthermore, when testifying as to the existence of the memoranda, she was asked to produce them. She did not do so, but produced what she said was a copy made from the originals, and testified that she had destroyed the originals, after being ordered to produce them.

There can be but one inference from such testimony, and that is, that the memorandum was manufactured in the guilty effort to bolster up her claim that the certificates were secretly delivered to her before the time of her husband's insolvency.

The account books of her husband show that during all these years this stock belonged to him. The evidence shows that it stood upon the books of the corporation in his name; that he voted it without a proxy, that he repeatedly signed documents asserting that he was the owner of it, and that on every occasion when it was necessary to produce the certificates for any purpose, they were produced by J. Downey Harvey himself. No person ever saw these certificates in the possession of his wife; the wife's confidential maid, who had access to the portable safe "not higher than her lap" where it was

finally claimed the certificates were kept, and who must have seen them if they had in fact been kept there, was not called as a witness nor did the defendants account for her absence. In 1910, after his admitted insolvency, Harvey's bookkeeper wrote "This is the property of Mrs. H. and belongs to her" upon the account in his ledger relating to this stock. Until that time the property was listed on these books and in the bookkeepers' statements of assets, as Harvey's private property.

In cases of this kind direct evidence is impossible to obtain, but we confidently affirm the circumstantial evidence of fraud in this case is literally overwhelming. The judge who tried this case was convinced that the transfer was made after the insolvency of J. Downey Harvey, and that there was no truth in the claim of any prior transfer. The witnesses being before him, he took cognizance of many things that cannot be incorporated in the record. As said in *Sonnentheil v. Brewing Co.*, 172 U. S. 401, at page 410:

* * * "Parties contemplating fraud frequently pursue such devious courses to conceal their designs, and resort to such subtle practices to mislead their unsecured creditors that the fraud becomes impossible to detect, unless the door be swung wide open for the admission of all testimony having any possible bearing upon the question. Facts which to the court might seem of no pertinence and be rejected as having no legal tendency to show knowledge of fraud, might be considered by the jury as significant and indicative of a guilty participation. Even negative evidence may sometimes have a positive value."

And we cannot do better than to close this brief with the following quotation from that ancient and

celebrated *Twynes Case*, decided in Star Chamber in 1601, 3 Coke, 80 b., where the court said:

"First: That this gift had the signs and marks of fraud.

"Second: The donor continued in possession and used them as his own and by reason thereof he traded and trafficked with others and defrauded and deceived them.

"Third: It was made in secret.

"Fourth: It was made pending the writ.

"Fifth: Here was a trust between the parties, for the donor possessed all and used them as his proper goods and fraud is always apparelled and clad with a trust and a trust is the cover of fraud.

"Sixth: The deed contains the statement that the gift was made honestly, truly and bona fide * * *

"And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole court, that all statutes made against fraud should be liberally and beneficially expounded to suppress fraud."

Dated, San Francisco,
February 26, 1916.

Respectfully submitted,

BERT SCHLESINGER,

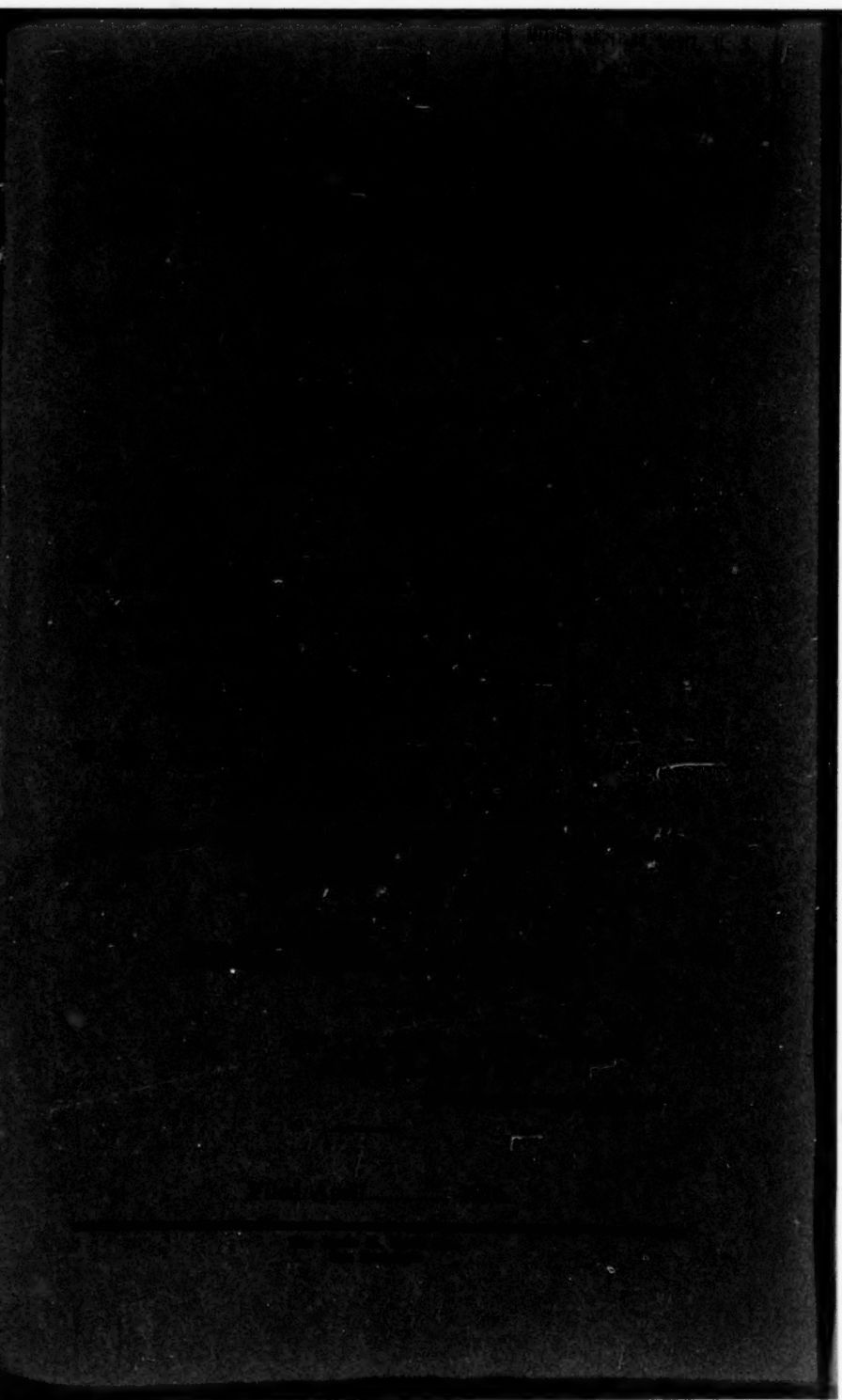
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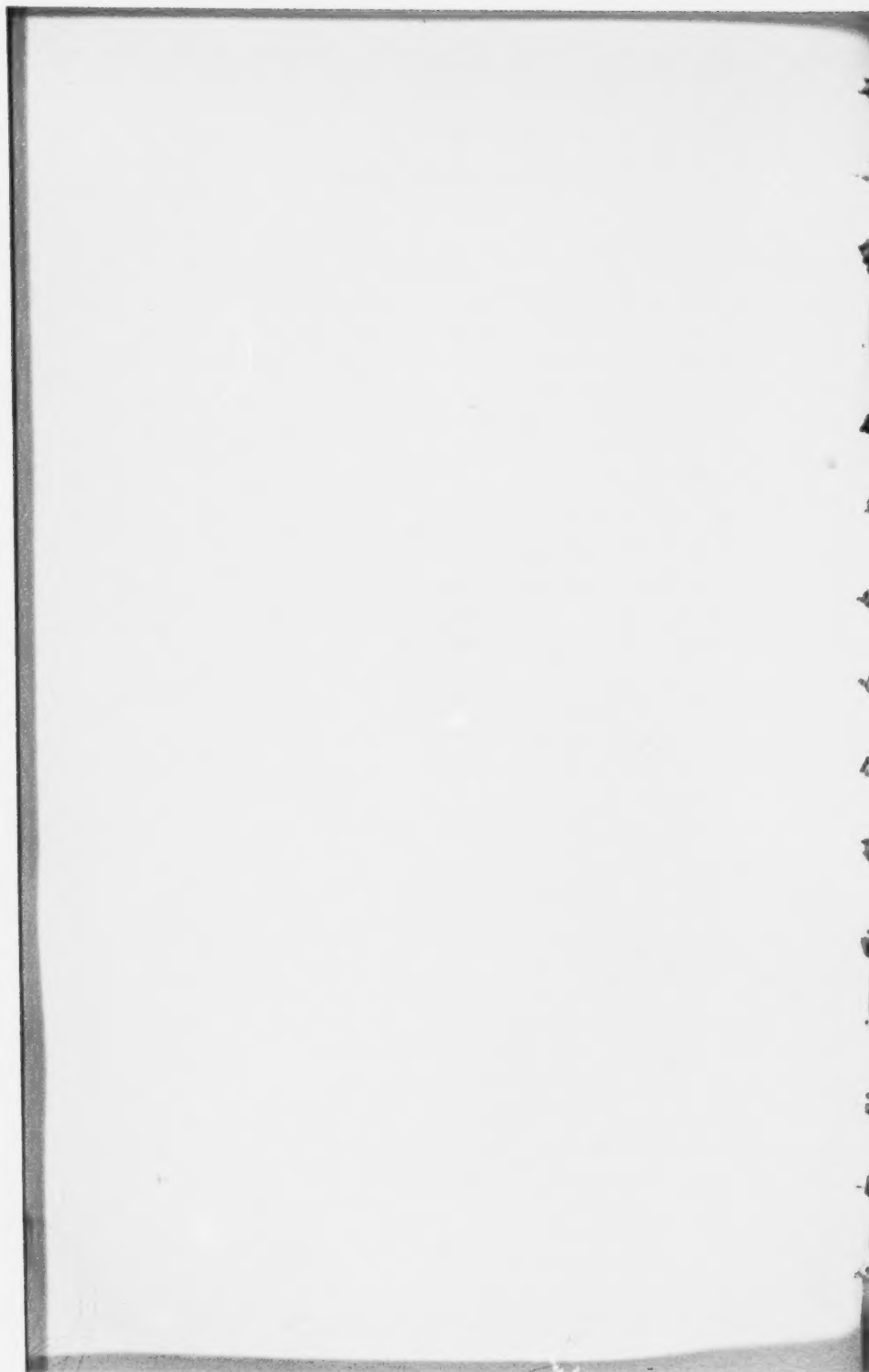
SUBJECT INDEX.

	Pages
SYNOPSIS OF THE CASE.....	1
1. Valid Gift of Shares of Stock, How Made.....	1
2. Brief Statement of the Evidence.....	2
3. The Evidence Weighed with Great Care by the United States Circuit Court of Appeals.....	5
4. It Was the Duty of the Appellate Court to Reverse the Chancellor Because of Latter's Serious Mis- takes in Dealing with the Facts.....	6
5. Also Because Trial Judge's Conclusions Clearly in Conflict with Weight of Evidence.....	7
THIS APPEAL IS ON QUESTIONS OF FACT ALONE, AND IN CASES OF THIS CHARACTER NO DUTY RESTS UPON THIS COURT TO GO ELABORATELY INTO FACTS.....	7
THE TRIAL JUDGE MADE A NUMBER OF SERIOUS MISTAKES IN DEALING WITH THE FACTS.....	9
I. <i>Mr. Harvey's Testimony:</i>	
(1) Mr. Harvey's Books of Account Do Not Discredit Him.....	10
(2) The Stock Books, Minutes, and Records of the Shore Line Investment Company Do Not Discredit Him.....	16
(3) His Bookkeeper's Letter Does Not Dis- credit Him.....	25
II. <i>The Trial Judge Was Not Justified in Rejecting Mrs. Harvey's Testimony.....</i>	27
(1) Inability to Remember Off Hand after Sev- eral Years Where One Has Put Things Away Is No Reason for Discrediting Wit- ness	28
(2) Her Conduct in Correcting Her Mistake Was Right and Proper.....	38

	Pages
(3) The Written Memorandum on Which She Wrote the Dates of the Several Certificates Does Not Contradict Her.....	43
(4) The Failure to Call Lizzie Anderson and Mr. Folger Justifies no Adverse Presumption..	44
(5) The Law Is That if Conduct is Consistent with Honesty of Purpose, the Presumption Will Attach That Such Conduct Was In- nocent	45
THE STRONG PREPONDERANCE OF THE EVIDENCE IS AGAINST THE FINDING OF THE TRIAL JUDGE.....	46
Mr. Harvey's Testimony.....	47
Mrs. Harvey's Testimony.....	48
Burke Corbet's Testimony.....	49
Charles W. Fay's Testimony.....	50
Mrs. Ward Barron's Testimony.....	50
Edward A. Wasserman's Testimony.....	50
James W. Crosby's Testimony.....	51
Charles W. Fay's Testimony (recalled).....	52
THE VALUE OF THE CORROBORATING EVIDENCE—THE LAW RELATING THERETO.....	53
THERE IS NO MERIT IN THE SUGGESTION THAT MR. HAR- VEY WAS CLOTHED WITH FALSE CREDIT BY MRS. HARVEY	56
THERE WAS AN ACTUAL AND CONTINUED CHANGE OF POSSESSION OF THE STOCK CERTIFICATES GIVEN TO MRS. HARVEY	58
IN CONCLUSION.....	62

LIST OF CASES CITED.

	Pages
<i>Allen-West Com. Co. v. Grumbles</i> , 129 Fed. Rep., 287, 290	2, 59, 60
<i>Atlantic Transport Co. v. Imbrovek</i> , 234 U. S., 52, 63..	8
<i>Bloom v. National Sav. & Loan Co.</i> , 152 N. Y., 114, 119	8
<i>Calkins v. Equitable Bldg. & Loan Assn.</i> , 126 Cal., 531.	2, 60
<i>Case v. Case</i> , 17 Cal., 600.....	45
<i>Chicago Junction Ry. v. King</i> , 222 U. S., 222.....	8
<i>Childs v. Merrill</i> , 29 Atl. Rep., 533.....	45
<i>Civil Code of California</i> , §290.....	22
<i>Civil Code of California</i> , §304.....	22
<i>Civil Code of California</i> , §3440.....	58
<i>De Laval, etc., Co. v. Iowa Dairy, etc. Co.</i> , 194 Fed. Rep., 423, 425.....	6
<i>Electric, etc., Co. v. Safe Deposit, etc., Co.</i> , 145 Cal., 124, 130.....	3, 55
<i>Ellicott v. Pearl</i> , 10 Peters, 439 (12 Curtis at 186)....	55
<i>First National Bank v. Holland</i> , 39 S. E. Rep., 126, 128.	2, 54
<i>Grand Trunk Ry. v. Lindsay</i> , 233 U. S., 42.....	8
<i>Jones Commentaries on Evidence</i> , Vol. 1, §13.....	45
<i>Kimberly v. Arms</i> , 129 U. S., 512.....	7
<i>National Bank v. Western Pac. Ry.</i> , 157 Cal., 573, 576	2, 20, 57, 60
<i>Smith v. S. F. N. P. Ry. Co.</i> , 115 Cal., 593.....	21, 22
<i>Sprague v. Walton</i> , 145 Cal., 228, 233-234.....	55
<i>Spreckels v. Nevada Bank</i> , 113 Cal., 272, 276.....	2, 60
<i>State of Iowa v. Carr</i> , 191 Fed. Rep., 257.....	6
<i>Texas Pacific Ry. v. Howell</i> , 224 U. S., 577.....	8
<i>United States v. Marshall</i> , 210 Fed. Rep., 595, 597....	6, 16
<i>Wigmore on Evidence</i> , Vol. II, §1129.....	54
<i>Yazoo and Miss. Ry. v. Wright</i> , 235 U. S., 376, 378....	8



In the Supreme Court

OF THE

United States.

OCTOBER TERM, 1914

No. 778

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt,	}	<i>Appellant,</i>
vs.		
S. G. HARVEY.		

Appeal from the United States Circuit Court of Appeals for
the Ninth Circuit.

BRIEF FOR APPELLEE.

SYNOPSIS OF THE CASE.

In California a valid gift of shares of stock may
be made by delivering the stock certificate to the

donee, endorsed in blank. No transfer upon the books of the corporation is necessary to complete the gift.

Calkins v. Equitable Bldg. & Loan Assn.,
126 Cal., 531;

Spreckels v. Nevada Bank, 113 Cal., 272,
276;

National Bank v. Western Pacific Ry., 157
Cal., 573, 576.

See also:

First National Bank v. Holland, 39 S. E.,
126, 128;

Allen-West Com. Co. v. Grumbles, 129 Fed.,
287, 290.

Opinion, U. S. C. Ct. of App., Tr., p. 202.

Both Mr. and Mrs. Harvey testified that a gift of 546 shares of Shore Line Investment Company stock was made to Mrs. Harvey in the foregoing manner in 1905.

The appellant claims that the gift was not made until Nov. 26, 1909.

It was and is the theory of appellant that the claim of Mr. and Mrs. Harvey that the gift was made in 1905 was a fabrication concocted many years after 1905 for the purpose of defrauding Mr. Harvey's creditors. Whether the gift was made in 1905 when Mr. Harvey was solvent, or on No-

vember 26, 1909, when he was insolvent, was the only question in the case.

The testimony of third persons—three of whom were the appellant's own witnesses—made it perfectly clear that the claim that the gift was made in 1905 was not a recent one; that declarations regarding the gift had been made in 1905 contemporaneously with the alleged date of the gift, and that both the husband and the wife had repeatedly declared that the stock belonged to Mrs. Harvey at various times long antedating Mr. Harvey's insolvency.

That this evidence was properly admitted cannot be doubted.

Electric, etc. Co. v. Safe Deposit, etc. Co.,
145 Cal., 124, 130.

The attorney and secretary of the corporation testified that in 1905, shortly before the organization of the company, Mr. Harvey told him that he was buying these shares for Mrs. Harvey and was giving them to her; also that when the shares were issued, Mr. Harvey explained to him (the attorney and secretary) why he did not place them of record in his wife's name, and that later Mr. Harvey told the witness that he had given the stock to Mrs. Harvey (Tr., pp. 97-98).

The present Postmaster of San Francisco, who in 1906 was the manager of the Shore Line Invest-

ment Company, testified that in that year Mr. Harvey told him that the stock belonged to Mrs. Harvey (Tr., p. 164).

Mrs. Barron, Mrs. Harvey's daughter, testified that in 1907 Mrs. Harvey told her that she had this stock (Tr., p. 174).

Similar statements were made by Mr. Harvey to his successive bookkeepers, Mr. Wasserman and Mr. Crosby, at various times long prior to November 26, 1909—the date which appellant claims to be the true date of the gift (Tr., pp. 116, 127-128).

In addition to the foregoing, there is also in evidence the significant fact that these certificates of stock were not at any time with Mr. Harvey's securities—either in his business safe or in his safe deposit box (Tr., pp. 116-118).

It appears, moreover, that in April, 1907, when Mr. Harvey paid an assessment on the stock he did not present the certificates with the stock. For that reason the customary words, "assessment paid" could not be stamped upon them contemporaneously with the payment. He explained to the company's employee (Mr. Crosby) that Mrs. Harvey was away; that the stock was hers; that she had the certificates in her possession, and that he could not get them until her return. It also appears that later on he did bring the certificates in and have them stamped accordingly (Tr., p. 128). Mr. Wasserman, who was present, also testifies to the foregoing circumstance (Tr., p. 116).

Finally, in 1909, a number of weeks before the stock was transferred into Mrs. Harvey's name, the company's manager desired possession of the certificates for a particular purpose. He called on Mr. Harvey in San Francisco for them. The latter informed him that they were in Mrs. Harvey's possession at Monterey and that he would send for them. A few days later the manager called and got the certificates (Tr., pp. 164-165).

Against this mass of testimony there was not a single adverse witness. The trial Judge, however, misconceived the evidentiary value of Mr. Harvey's books of account, and of the corporate records. He thought that they discredited Mr. Harvey when in fact they did not, and for that reason the trial Judge refused to believe his testimony.

And because Mrs. Harvey in a totally different proceeding before the Referee in Bankruptcy, some months before this suit was brought, had at first failed to remember accurately the place where she had placed these certificates when given to her some six years before, and had subsequently corrected her testimony, the trial Judge rejected her testimony *in toto*.

The Circuit Court of Appeals before reversing the findings of the trial Court weighed the evidence with great care, as its elaborate opinion shows (Tr., pp. 197-211). Its conclusion was that the trial Judge was not justified in rejecting the testimony of these two witnesses; that he had made a serious

mistake in weighing the testimony, and that the gift was established by a strong preponderance of evidence.

The opinion concludes with the following words:

"We have not overlooked the rule invoked by counsel for appellee that the finding of the chancellor or the trial court upon conflicting evidence is presumably correct. In this case, however, not all the evidence was taken in open court. Indeed, the principal part of Mrs. Harvey's evidence was taken before the Referee and read upon the trial. We think, however, that a serious mistake was made by the trial court in giving undue importance to the carrying of the stock in Harvey's name on the stock books, to the minutes of the corporation meetings and to Harvey's private books, and that the strong weight of the testimony is against its findings" (Tr., p. 211).

The United States Circuit Court of Appeals was, of course, not bound by the facts found by the trial judge. It is well settled that that court will not hesitate to reverse the trial court upon the facts where there has been "a serious mistake in dealing with the facts."

United States v. Marshall, 210 Fed., 595,
597;

DeLaval, etc. Co. v. Iowa Dairy, etc. Co.,
194 Fed., 423, 425;

State of Iowa v. Carr, 191 Fed., 257.

And the United States Supreme Court has said that it is proper for a court of equity upon appeal to set aside the findings of a trial judge

"when clearly in conflict with the weight of the evidence upon which they were made."

Kimberly v. Arms, 129 U. S., 512.

When the United States Circuit Court of Appeals found not only that a serious mistake had been made in dealing with the facts, but that the weight of the evidence was with this appellee, the reversal of the judgment necessarily followed.

NO DUTY RESTS UPON THIS COURT TO REVIEW
ELABORATELY THE FACTS DETERMINED BY THE
COURT OF APPEALS.

The presumption is that the view which the United States Circuit Court of Appeals took regarding the evidence was correct. The judgment which that Court reached should not be disturbed unless it can fairly be said that there was no reasonable ground for the conclusion that the findings of the trial court were against the weight of the evidence.

Such is the general rule in equity cases where the decision of an intermediate appellate tribunal is up for review.

Thus, in New York it was said:

"The facts found by the court, without a jury, or by a referee, are open to review in the General Term, and this court will not interfere with its judgment of reversal when it can fairly be said that the findings were against the weight of evidence or that

the proof so clearly preponderates in favor of a contrary result that it can be said, with reasonable certainty, that the conclusions of the trial court upon the evidence were erroneous."

Bloom v. National Sav. & Loan Co., 152
N. Y., 114, 119.

The case at bar is reviewable in the United States Supreme Court only because of what was probably a legislative oversight—an oversight which Congress has since corrected. This appeal could not be brought here to-day.

In cases of this general class—i. e., actions to set aside alleged fraudulent transfers—the judgment of the Circuit Court of Appeals is made final by the Act of 1891. Where a case belongs to a class as to which the judgment of the Circuit Court of Appeals ordinarily is final, and the case finds itself in this Court on the facts alone, this Court has said that it will examine the facts only far enough to see if plain error has been committed.

Chicago Junc. Ry. v. King, 222 U. S., 222;
Texas Pac. Ry. v. Howell, 224 U. S., 577;
Grand Trunk Ry. v. Lindsay, 233 U. S., 42.

Not only has this Court announced this rule in cases arising under the Safety Appliance Act, but it has applied it in Admiralty (*Atlantic Transport Co. v. Imbrovek*, 234 U. S., 52, 63). And also to cases arising under the Employers' Liability Act (*Yazoo and Miss. Ry. v. Wright*, 235 U. S., 376,

378). There is every reason in principle why the rule should embrace the case at bar.

But however this may be, we shall make it very clear that the Circuit Court of Appeals was right in its conclusion that the trial judge made serious mistakes in dealing with the facts, and that the strong weight of the evidence was clearly in accord with Mrs. Harvey's claims.

THE TRIAL JUDGE MADE A NUMBER OF SERIOUS
MISTAKES IN DEALING WITH THE FACTS.

This is not a case where one witness has testified that there was a delivery of the stock certificates and another has denied it. The only witnesses for or against the actual fact of the delivery of the gift are the donor and donee. They both testified that the stock was delivered in 1905, but the trial judge refused to believe either of them, for reasons which were set forth in his opinion. *These reasons were examined critically by the Circuit Court of Appeals and were held to be based upon "a serious mistake"* (See opinion, Tr., p. 211).

I. MR. HARVEY'S TESTIMONY.

It is to be noted that there is no intrinsic conflict in Mr. Harvey's testimony; but the trial judge considered that the entries in his books of account and his continued relation to the corporation as its

president and as a stockholder of record, and acts performed by him as such, were circumstances so inconsistent with his testimony that he had parted with the ownership thereof that the latter was not worthy of credence. The question is therefore not one which concerns the relative credibility of opposing witnesses, nor of intrinsic conflict; but it is a question of the weight to be given to specific acts and bits of documentary evidence as against the presumption that the witness upon the stand spoke the truth. The United States Circuit Court of Appeals, as we have already seen, said in this connection "we think . . . that a serious mistake was made by the trial court in giving undue importance to the carrying of the stock in Harvey's name "on the stock books, to the minutes of the corporation "meetings, and to Harvey's private books of account" (Tr., p. 211).

1. *Mr. Harvey's Books of Account Do Not Discredit Him.*—Entries in books of account might under some circumstances go far to impeach a witness. But under the circumstances of this case they are of no value whatever to show that the gift was not made; for other gifts of land and stocks, the validity of which cannot be disputed, continued to be treated on the books exactly as this property was treated.

To say the least, Mr. Harvey's books were not kept in businesslike fashion. The bookkeeper who made these entries testifies that he had the books

at his own home for several years (Tr., p. 122); he received no salary for his work on them (Tr., p. 120); he worked on them only on Sundays or in the evenings (Tr., p. 122); he made no entries for a year at a time (Tr., p. 121); he remembers that on one occasion he was 18 months behind in writing them up (Tr., p. 125); his work on these books, as Mr. Harvey's bookkeeper, began in 1908, and he testified: "I cannot say positively when: but sometime in 1908 or 1909 he (Mr. Harvey) gave me instructions to note at the head of the Shore Line Investment Co. account in the ledger, that the stock belonged to Mrs. Harvey" (Tr., p. 121; see also p. 120).

The failure of this haphazard system of book-keeping to note by a contemporaneous entry the gift of this stock to Mrs. Harvey, is a circumstance utterly insufficient to stamp Mr. Harvey's positive testimony as perjury. Nevertheless, these books of account made a deep impression upon the trial court; for the learned trial judge lays much stress upon them, saying among other things:

"The stock was carried in his private books of account—his journal, ledger, and trial balance book—as his individual property. Prior to November, 1909, there was not a suggestion in these books that the stock belonged to Mrs. Harvey" (Tr., p. 31).

We may add to what the trial judge thus says, that even in November, 1909, there was no entry in Mr. Harvey's books that the stock belonged to

Mrs. Harvey. The first entry of this gift is found under date of March 31, 1910—*four months after the actual transfer of the stock into Mrs. Harvey's name on the books of the corporation.*

The following facts demonstrate the serious error in the reasoning of the trial court as to the evidentiary value of the books:

First, the shares of stock which are the subject-matter of this suit were unquestionably transferred into the name of Mrs. Harvey on the Company's books on November 26, 1909. The complaint avers that they were actually given to her on November 26, 1909; nevertheless, there is no entry whatever of the fact, nor is there any entry having reference to the stock until more than four months later, when, under date of March 31, 1910—not in November, 1909, as the trial court mistakenly says in its language quoted *supra*—the entry appears under the caption "Family Gifts and Allowances" (Tr., p. 119). And let it be noted, moreover, that while this entry is dated March 31, 1910, it seems probable that it was not actually written in the book until some seven months later—i. e., until after the inauguration of the bankruptcy proceedings in November, 1910 (Tr., pp. 123, 124).

The reasoning of the learned trial judge leads to this illogical result: Here we have the appellant Stowe himself alleging that this stock was given to Mrs. Harvey on November 26, 1909; we

have an actual transfer of the stock certificates on that day into Mrs. Harvey's name. There is no entry whatever of this alleged gift on these books. If the failure to make these entries before March or November, 1910, does not prove the falsity of appellant's own allegation that there was a gift or transfer at least as early as November 26, 1909—and of course it does not—why, in the name of reason, does the like failure to make that same entry prove that there was no gift as early as 1905?

But that is not all: The trial judge reasoned that the gift of this stock, if it had been made, would have been noted contemporaneously in Mr. Harvey's books of account. He mistakenly assumed that other gifts which Mr. Harvey had made to his wife were so noted. The error in drawing such a deduction is obvious; for the fact is that neither of the two other gifts made by Mr. Harvey to Mrs. Harvey was contemporaneously noted in his books, and one of said gifts, although admittedly made in 1907, was not noted in the books earlier than March 31, 1910—the very date on which the gift of the stock in controversy was also noted.

One of these gifts was a parcel of real property—a lot on Pacific Avenue in San Francisco. The other was of shares of Santa Cruz Beach Co. stock. (As to these gifts see Tr., p. 151.)

(a) *The Pacific Avenue Lot*.—This lot was deeded to Mrs. Harvey on February 28, 1905. Nevertheless, the gift was not entered upon Mr. Har-

vey's books until the 31st of the following December—10 months later (Tr., p. 16), and during all of that time this lot was carried on the books as one of Mr. Harvey's assets (Tr., pp. 161 and 164). Even when noted on the books it was not entered under the head "Family Gifts and Allowances" as it should have been; nor was it ever entered up so as to indicate what it really was—a gift of land; but under the heading "Pacific Lots" etc., the following note was made *ten months after the fact*: "December 31, 1905, By personal expense, gift to Mrs. Harvey, \$15,327.50" (Tr., p. 102). That was the only entry of that gift of land.

The failure to enter up this important gift for ten months did not tend to cast doubt upon the incontrovertible fact that the land had been duly deeded away to Mrs. Harvey in the month of February, 1905. Then why in the name of reason should a like condition of these same books with regard to these shares of stock justify the court in branding Mr. Harvey as a perjurer?

(b) *The Santa Cruz Beach Stock*.—This stock was given to Mrs. Harvey in 1907 (Tr., p. 151). For three years it was not entered up in the books. Finally, on March 31, 1910—the identical date of the entry of the gift of the stock here in controversy—the following item appears under "Family Gifts and Allowances": "March 31, 1910, Mrs. H. 20 shs. pfd., May 14, 1907, \$1,000" (Tr., p. 102).

Here we have a situation identical with that of the Shore Line Investment stock. One gift was made in 1905; the other, in 1907,—that is the only difference. Both gifts were omitted from the books until sometime in 1910, when, under date of March 31st, both were entered up in substantially the same way. One has never been questioned; the other is repudiated by the judge upon the utterly inconsistent and illogical ground that if it had in fact been made, it would, forsooth, have been entered contemporaneously in the books!

We respectfully urge the Court to give full consideration to the situation which the foregoing facts regarding these three gifts present. It comes to this: Here is Mr. Harvey doubted and discredited and his testimony rejected by the trial judge because his books fail to show a timely entry of this transaction. And yet the only other gifts of specific properties which Mr. Harvey ever made to his wife—gifts admitted to have been valid—were not entered with any more accuracy, and one of them—likewise a gift of stock—was not entered for three years, and then the entry was made at the very same time that the gift in controversy was noted on the books.

And note, too, that the very man who made the entry dated March 31, 1910, testified that Mr. Harvey told him to make the entry at least as early as 1908 or 1909, after he became Mr. Harvey's

bookkeeper, and that he had been told that the stock belonged to Mrs. Harvey at least as early as April 13, 1907,—at a time when he was employed, not by Mr. Harvey, but by the corporation (Tr., pp. 120, 121, 128 and 116).

The learned trial judge overlooked all of the matters we point out above. He drew from the books of account the harsh and unwarranted conclusion that Mr. Harvey's testimony must be rejected chiefly because there is no timely entry of the gift. There is thus presented a clear instance in which the trial court fell into what the appellate courts call "serious error of fact."

United States v. Marshall, 210 Fed. Rep.,
595, 597.

2. *The stock books, minutes and records of the corporation did not discredit Mr. Harvey's testimony.*

The Circuit Court of Appeals said in its opinion:

"We think . . . that a serious mistake was made by the trial court in giving undue importance to the carrying of the stock in Harvey's name on the stock books, (and) to the minutes of corporation meetings (Tr., p. 211).

A brief analysis will demonstrate the correctness of the foregoing conclusion.

The facts referred to by the Court of Appeals

which the trial court relied on as discrediting Mr. Harvey's testimony are the following:

1. Notwithstanding Mr. Harvey's testimony that he had already endorsed and delivered to Mrs. Harvey these certificates of stock representing 546 shares, Mr. Harvey continued to hold the stock in his own name on the books of the corporation.

2. On the 3rd day of January, 1906, Mr. Harvey was elected President of the Board of Directors of the Corporation and has been its President ever since (Tr., p. 88). The only stock standing in his name prior to June 1, 1909, was the 546 shares of stock here in dispute.

3. As a stockholder at stockholders' meetings, Mr. Harvey voted the 546 shares of stock thus standing in his name.

4. At a meeting of the Board of Directors held on April 25, 1907, Mr. Harvey was present. It appears from the minutes that Mr. Harvey, with others, submitted to an assent to an amendment of the By-Laws, which assent contained the following phraseology: "We, the undersigned, stockholders of the Shore Line Investment Company," etc. (Tr., p. 89).

5. At a meeting of the stockholders held June 2, 1907, Mr. Harvey was present and acted as Chairman of the meeting. He represented in person 480 of these 546 shares of stock, being all of this stock standing in his name at the time (Tr., p. 90).

6. At an adjourned meeting of the Board of Directors held November 27, 1906, at which meeting it appears that Mr. Harvey was present, a resolution was adopted that the Articles of Incorporation be amended by and with the written consent of stockholders representing two-thirds of the subscribed capital stock (Tr., p. 91).

Mr. Harvey signed said written consent. It be-

gins with the phraseology: "We, the undersigned, being the owners and holders of the number of shares of the capital stock of the Shore Line Investment Company set opposite to each of our respective names, and representing and owning more than two-thirds of the issued capital stock," etc. Opposite Mr. Harvey's name, under the heading "Number of Shares of Stock," appear the figures "546."

7. At a stockholders' meeting held on May 4, 1909, Mr. Harvey acted as President and voted the said 546 shares of stock as a stockholder.

Giving to the foregoing facts and circumstances every reasonable inference, they are utterly insufficient to raise the slightest question as to the truth of Mr. Harvey's testimony to the effect that at all of these times these certificates of stock were in the possession of and belonged to his wife.

This is so because every one of the enumerated acts could properly be performed by one who had in fact parted with his title to the stock.

It is the usual, rather than the unusual thing for stock in corporations to stand on the books in the names of persons other than those who actually own the shares represented by the stock certificates. It may probably be said with perfect truth that 90 per cent. of the stock of corporations in California is so held. Nor is it at all unusual for persons having no beneficial interest whatever in stock standing in their names to act as Directors and Officers of corporations. These are facts of common knowledge. Mr. Folger was a director of this very corporation under such circumstances (Tr., p. 96).

And yet it will be noted that the learned judge of the court below lays stress upon the fact that Mr. Harvey continued to act as *President* and *Director* of this corporation after he claims to have parted with this stock (Tr., p. 31).

The fact that stock belongs to a wife and that the husband is acting in her interest and as her representative is of itself a good and sufficient reason why a husband should sit on the Board of Directors and accept the presidency of such a corporation.

But the trial judge did not stop with his unwarranted inference that the mere carrying of the stock on the books in Mr. Harvey's name indicated that he had not made the gift. He reasoned that this was a *concealment* of the gift. He says:

"A peculiar feature of this transaction is the fact that for more than four years Mrs. Harvey's ownership of the stock in question was concealed from the public. Mr. Harvey attempts to explain this by saying that he was very largely interested in the Ocean Shore Railroad, etc." (Tr., p. 44).

Concealed from the public! How? Mr. Fay knew of it. Mr. Corbet knew of it. Mr. Wasserman and Mr. Crosby both knew of it. Mrs. Barron knew of it. From whom, then, was it concealed? In California the general public has no right to see the stock books of a corporation. It was not a concealment, either from the public or from Mr. Harvey's creditors, to carry the stock in Mr. Harvey's name on those books.

The Supreme Court of California in a recent case refers to the mistaken:

" . . . notion that 'the stock and transfer book' of a corporation is made a public record, accessible to all persons, intended to give notice to everybody of the status and ownership of the title to the stock, and that it is therefore available to the creditors of the stockholders and to persons dealing with them with respect to the stock."

The Court goes on to say:

"This is the law of some of the States where the rule contended for by the defendant prevails, **but it is not the law of this State.** . . . The creditors of the individual stockholders have no such right of access, and the books could not constitute notice to them. **Nor could these books hold any person out to the world as the owner of any stock, since the world could not have access thereto.** Stockholders and creditors of the **corporation** are the only persons who have the right to inspect the books (Civ. Code, Sec. 378)."

Nat. Bank, etc. v. Western Pac. Ry. Co., 157 Cal., 573, 581.

"A peculiar feature of this transaction," says the opinion of the trial judge. Why "peculiar"? It is not a peculiar thing for one who is a stockholder, but not a stock *owner*, to serve on a Board of Directors or act as an officer of a corporation. *Mr. Folger was for a year under similar conditions a stockholder of record and a director of this very corporation.* Nor is the fact to be overlooked that the Appellant Stowe, as Trustee in Bankruptcy, succeeded in 1910 to the

ownership and possession of the ten shares of stock which belonged to Mr. Harvey individually. Three years later—at the time of the trial—they still stood in Mr. Harvey's name (Tr., p. 96). No one suggests that this is a "concealment," or contrary to public policy, or a fraud. Is Mr. Stowe "concealing his ownership from the public"? and is his conduct "peculiar"?

Next as to the point that Mr. Harvey continued to vote this stock: That he had a legal right to vote it, cannot be questioned. When he purchased the stock and it was issued to him he became in law a *bona fide* stockholder upon the books of the corporation and continued to be such—although he had given the stock away—until the transfer of these shares into the name of Mrs. Harvey. In California a *bona fide* stockholder is not necessarily the *owner* of stock; and one who becomes a *bona fide* stockholder does not cease to be such by the endorsement and delivery by way of sale or gift of the shares of stock to another, although he ceases thereby to be the "owner."

Smith v. S. F. N. P. Ry. Co., 115 Cal., 593.

The fact that Mr. Harvey voted this stock as a stockholder is therefore not inconsistent with his testimony that he had endorsed and given the certificates of stock to his wife.

The same is true with regard to the signature of

Mr. Harvey to the amendment of the By-Laws.
He was a lawful *stockholder*, though not *owning* the shares, and as such stockholder could give a valid assent to the amendment of the By-Laws.

Smith v. S. F. N. P. Ry Co., supra;
Civil Code of Cal., §304.

Mr. Harvey's signature to the amendment of the Articles of Incorporation stands upon a like footing. The Civil Code of California (§290) provides that an amendment such as was here made, may be brought about by the written consent of a majority of the *stockholders* of the corporations. Although not a stock owner Mr. Harvey was a stockholder, as that word is used in law, and could lawfully sign as such. In company with others he signed such consent. It begins with the words: "We, the undersigned, being the *owners* and *holders* of the number of shares of the capital stock of the Shore Line Investment Company set opposite our respective names," etc.

Critically construed, Mr. Harvey's signature to this document did not constitute even a formal declaration that Mr. Harvey was the owner of this stock. The requirement of the recital is fulfilled if some of those signing were the owners of stock, while others were mere stockholders upon the books of the corporation. But be this as it may, Mr. Corbet, a member of the Bar and Secretary of the

corporation, had prior to the transaction been informed by Mr. Harvey that the stock standing in Mr. Harvey's name belonged to Mrs. Harvey, and not to Mr. Harvey. The attorney drafted the document. He was acting as the legal adviser of the Corporation and requested Mr. Harvey to sign it (Tr., pp. 97-98). His testimony is:

"The reason that I, knowing these facts, permitted him to sign a document, 'we, the undersigned owners and holders of the number of shares, etc.' was because the stock showed on the books of the corporation in Mr. Harvey's name, and I deemed it advisable, in order to make the thing show as being a legal document, that it be signed by Mr. Harvey, and I advised Mr. Harvey at that time to sign the document" (Tr., p. 98).

The relationship of Mr. Harvey to Mrs. Harvey, instead of making it improbable that after the gift of this stock to her, he would continue to participate in the active management of the affairs of the corporation, affords a most excellent reason why he should so continue to act. While no further explanation is necessary it is perhaps well to point out that Mr. Harvey gave the following reasons why he deemed it to the best interests of Mrs. Harvey that he should continue to act as stockholder and officer of the corporation:

"I said to her that the reason I am retaining them in my name is that I am very largely interested in the Ocean Shore Railroad, and these two companies are associated in the development of one another, one depends upon the success of the other (Tr., pp. 149-50). There was a great deal of rivalry down that way

as to this land business. . . . If I was not connected with the Shore Line Investment Company, its position would be just the same as the other companies not associated with the railroad. There were other real estate companies formed. There was one called the Ocean Shore Land Company, which was very misleading, and it made many people believe that the Ocean Shore Railroad Company was interested in the development of the Ocean Shore Land Company. They took half our name and used half our name to designate their business, but we had no association with them whatever. There were several things arising like that so that it afterwards turned out to be of immense benefit that I retained my identity as a stockholder in the Shore Line Investment Company" (Tr., pp. 156-157).

It was proper that he should reason that an intending purchaser of a town lot would naturally prefer to buy in a town in which the officers of the railroad upon which it was dependent took an interest. His presidency of both corporations would indicate this to intending purchasers.

We thus see that there was nothing either illegal or sinister in Mr. Harvey's failure to have the stock transferred into his wife's name. It was the natural thing for a husband to do, who had the interests of his wife in mind, and who desired to make his gift to her productive and valuable. Under the circumstances there is nothing whatever in this evidence to warrant even a suspicion—let alone an inference—that the failure to transfer the stock into Mrs. Harvey's name indicated that Mr. Harvey did not tell the truth when he testified that he had delivered the certificates to her.

3. *The Wasserman Letter Did not Discredit Mr. Harvey's Testimony*—The letter written by Mr. Wasserman to Mr. Harvey (Tr., p. 103)—upon which appellants lay much stress, was inconsistent neither with Mr. Wasserman's testimony nor with Mr. Harvey's. This letter, which is dated Sept. 27, 1907, says:

"Following are a list of your assets:

(Here follows a list of lands, *and the list also includes stocks*)

"Besides the above you should take into consideration the following:

Shore Line Investment.	\$23,610.00
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(Tr., p. 107.)

The very form in which this latter item is put indicates a question in the writer's mind as to Mr. Harvey's title to this Shore Line Investment stock. Otherwise, he would have put it down with the other stocks previously enumerated as constituting Mr. Harvey's assets. As it is, the writer sets it along with such items as "Ocean Shore bonds given in payment Assessment No. 3, . . . \$55,000" (Tr., p. 107)—evidently a most doubtful claim.

Some five months before the letter was written, when Mr. Harvey paid an assessment on the Shore Line Investment Company stock, Mr. Wasserman

had heard Mr. Harvey say "that Mrs. Harvey had possession of the stock" (Tr., p. 116), and he had never seen the certificates among Mr. Harvey's securities (Tr., p. 118). The stock was, however, at that time carried on Mr. Harvey's books in Mr. Harvey's name. But from what Mr. Harvey had said when the assessment was paid Mr. Wasserman may have been led to question whether the stock was Mr. Harvey's, or he may have thought that Mrs. Harvey would be willing to let Mr. Harvey use the stock as an asset. Moreover, Mr. Harvey did not himself make the statement contained in the letter, or adopt it as his own. But whatever Mr. Wasserman's reason for so writing, the fact remains that the statement in the letter is put in a form which is absolutely equivocal and it affords no logical basis for discrediting the positive and direct evidence of anybody.

In concluding our discussion of Mr. Harvey's testimony we desire to say that it is a serious thing to adjudge a man guilty of any attempted fraud; but it is a far more serious thing to hold that he has deliberately and wilfully borne false witness. Reputation rests on a fickle title indeed, if it can be torn and shattered in our Courts of Justice by harsh deductions from equivocal documentary statements, by false logic, and by undiscriminating analysis.

II. THE TRIAL JUDGE WAS NOT JUSTIFIED IN REJECTING MRS. HARVEY'S TESTIMONY.

We turn from Mr. Harvey's testimony to that of Mrs. Harvey.

Her reputation for truth, honesty and integrity is directly involved, and we therefore deem it our duty to go into the matter carefully and critically—dealing with each and all of the points urged against her.

The doubt cast upon Mrs. Harvey's testimony by the trial court centers in this circumstance: On December 5, 1911, before the Referee in Bankruptcy, she testified that she placed the certificates given to her by Mr. Harvey in her safe deposit box; and two weeks later, under circumstances which will hereafter appear, came again before the Referee and corrected this testimony by saying that she kept the said certificates in her private safe, first at her home and afterwards in Monterey.

Upon the trial she reaffirmed this latter statement.

It is to be noted that there is no intrinsic conflict whatever in Mrs. Harvey's testimony given orally before the trial judge. Read from end to end there is nothing in it whatever to suggest that she was not straightforward and candid (Tr., pp. 166-174).

But appellants offered the reporter's transcript of her testimony given upon three occasions some

months previously on certain hearings before a Referee in Bankruptcy.

This former testimony, it is claimed—and the trial judge agreed,—shows that Mrs. Harvey is unworthy of credence.

The trial judge makes no criticism of her manner before him. He had no better opportunity to study her manner when she gave her testimony before the Referee in Bankruptcy than did the Judges of the United States Circuit Court of Appeals. In its opinion the Appellate Court makes note of this fact, saying:

“We have not overlooked the rule invoked by counsel for appellee that the finding of the chancellor or the trial court upon conflicting evidence is presumably correct. In this case, however, not all the evidence was taken in open court. *Indeed, the principal part of Mrs. Harvey's evidence was taken before the Referee and read upon the trial*” (Tr., p. 211).

1. There is probably no fault of memory more common or universal than the inability to remember the place where one has put things away. After several years have gone by, even a keen business-man does not ordinarily remember as an independent fact whether he has placed a particular paper or security in his safe deposit or in his office safe or in the drawer of a desk. At best he merely reasons that he must have put it in this place or that because he makes it his practice to keep valuable documents of like character in this place or that.

Mrs. Harvey's situation was one of similar char-

acter. She had a safe at her home. She had a safe deposit box. In each of these she had kept certificates of stock at different times (Tr., pp. 169-170-172). At approximately the same time that the Shore Line Investment Company stock was given to her she had placed Bullfrog Mining Company stock in her safe deposit box and had forgotten all about having any such stock there at all at the time she testified before the Referee in Bankruptcy (Tr., p. 172-173). This of itself shows that she is not one of that rare group of extraordinary persons who remember where they have put things, years after the fact. That she was merely in error when first questioned before the Referee on this subject, and was not a wilful perjurer, is, we submit, the only just conception of her evidence. Such was the conception of the Appellate Court. That Court says in its opinion:

"Another thing which seems to militate against the accuracy of Mrs. Harvey's testimony is the fact that she first testified that she kept this stock in her safe deposit box at the First National Bank. She so stated positively and unequivocally. But later she changed her testimony and affirmed that the stock was kept in her own private safe at her residence or where she lived elsewhere. This was a matter about which she may have made a candid mistake. Women are usually not so careful in business dealings as men, and ordinarily do not keep a strict trace of their business affairs as men do. And it might well be that Mrs. Harvey made her private safe the depository of these bonds. . . . Mrs. Harvey's testimony that she received the stock from Harvey and that she continued in the sole possession with the two exceptions mentioned, we think must be

taken as the true statement of the fact. She first thought that she kept the stock in her safe deposit box at the bank, but she was afterwards convinced that she kept it in her own private safe,—a lapse of memory. . . . The further discrepancies in Mrs. Harvey's narrative which have been heretofore noticed are of no greater moment than often happens with perfectly truthful and candid witnesses. Mrs. Harvey's memory, she admits herself, is not always to be trusted. **But the corroboration that her testimony has received we think so fortifies the statements as to the material and potential fact that she received the stock as a gift from her husband and continued in the actual possession and dominion of the same until surrendered for exchange on November 26, 1909, for another certificate as to render them entirely worthy of belief**" (Tr., pp. 209-210, 211).

How well justified the Appellate Court was in reaching the foregoing conclusions is evident on the face of its own opinion. It may be proper, however, to elaborate some of the significant points in the matter:

Mrs. Harvey's testimony before the referee in bankruptcy on December 5, 1911, was as follows:

"In 1905 Mr. Harvey told me he was going to give me some stock in the Shore Line Investment Company. He gave me in June of that year 300 shares. He told me as he acquired more he would give it to me. In August he gave me 66 shares. In September he gave me 160 shares and 20 shares, and I put them in my box (Tr., p. 133). . . . I put the certificates in the safe deposit of the First National Bank, where I always have a box. . . . The first of these certificates was given to me in June, 1905. . . . He actually delivered me a certificate of stock at that time and he said I was to take it and put it in my box and I took it at that time and put it in my box (Tr., pp. 134-135).

"In December, 1906, Mr. Harvey stated he wanted

the stock certificate for 66 shares to make Mr. Folger a Director. I went to my box and got the certificate and gave it to Mr. Harvey. I received it back again endorsed by Mr. Folger's name and put it in my box (Tr., p. 134). . . . It was endorsed by Mr. Folger's name. The stock stood in Mr. Folger's name while he was acting as a Director, but I had the endorsed certificate in my safe-deposit box (Tr., p. 135).

"In December Mr. Folger went out of the directorship of the Shore Line Investment Co. and I got the certificate endorsed by Mr. Folger and gave it to Mr. Harvey. He gave me another one endorsed by himself and I put it in my box" (Tr., p. 133).

The last of the transactions thus testified to—the Folger transfer—had occurred *four years* before this testimony was given. The other transactions had occurred *from five to six and one-half years before*. They antedated San Francisco's great fire by one year. Enough had occurred since the fact of the delivery to confuse any average mind as to the details of such a transaction.

We request the Court to note that when Mrs. Harvey first appeared before the Referee, she was not asked any questions which might have helped her to recall the facts. For instance, she was not asked where she had kept this stock during the preceding four years. She was not at that time asked from what place or receptacle she had obtained the certificates in November, 1909, prior to their transfer on the books into her name in that month; nor was she at that time asked where she had kept the certificates ever since their issuance in her name. None of these or similar questions

which might have directed her attention to more recent facts which, by association, might have refreshed her memory as to the older transactions, were asked of her.

After Mrs. Harvey gave her testimony on Dec. 5, 1911, the creditors of Mr. Harvey set about making inquiries as to the dates of Mrs. Harvey's visits to her safe deposit box. The fact that this effort was being made to discredit her testimony came to her knowledge. She was either honest or she was dishonest. If honest, she would when apprised of the investigation into her visits to the safe deposit, most naturally and properly go over carefully all of the facts within her memory to see whether or not she had been mistaken; she would try to recall where she had kept the certificates after 1909 when the stock was first placed in her name, and where she had taken the original certificates from before the transfer was made, and also where she had obtained them when they were to be stamped "assessment paid." She did all of this and she recognized that she had been in error when she had said that in 1905 she had put these certificates in her safe deposit box. She realized, too, that she had made another error in her testimony as to some Philippine Telephone & Telegraph stock. She was naturally disturbed and perplexed. Any thoroughly honest person would be. She then for the first time, consulted with counsel (Tr., p.

168), and upon her counsel's advice she addressed a note to the attorney for the creditors, reading as follows:

"San Francisco, December 19, 1911.

"E. H. Williams, Esq.,

"San Francisco, California.

"Dear sir:

"If you wish to learn from the safe deposit company the dates on which I visited my safe deposit box, I have no objection whatever, and am perfectly willing that the bank officials shall give you the information, and you may tell them so for me. I do not myself know the exact dates of my visits. I have, of course, been there a number of times since 1905; but I have at all times had a safe of my own wherever I have been living, whether here or at Monterey, and I kept many of my papers in these safes, and, as I think it over, I am positive I kept my certificates of stock there instead of in my safe deposit box. I also forgot for the moment and omitted to tell you when on the witness-stand, of the sale by Mr. Harvey to me of 200 shares of Philippine Telephone & Telegraph stock in March, 1910. This stock was worth about \$20 per share, and the transfer to me was a part of the same transaction whereby I purchased the Visit a Valley Lots, the Beach Company's stock and other property enumerated by me in my testimony, but this Philippine stock had slipped my mind and I forgot to mention it. Should you, or Commissioner Kreft, wish me to correct my testimony in these particulars, I will, of course, do so gladly.

"S. G. HARVEY" (Tr., pp. 138-139).

This letter was delivered to plaintiff's counsel on December 19, 1911.

The suggestion in appellant's brief that Mrs. Harvey made her correction only when she saw that the Referee was going to rule that the Safe Deposit Company must disclose its private record

of her visits is utterly unwarranted by the record.

The testimony shows that while the Safe Deposit Company was making strenuous objections to producing its private records of its patrons' visits,—Mr. Harvey interrupted the proceedings by handing over Mrs. Harvey's letter (Tr., p. 145). He had been instructed to deliver the letter at once (Tr., p. 168). And appellant's counsel, who offered himself as a witness in his client's cause, could not bring himself to say that Mr. Harvey had been sitting in the room prior to the delivery of the letter (Tr., p. 145).

The suggestion that Mr. Harvey was to withhold this letter if the ruling was going to be against the production of the Safe Deposit Company's record, is thus shown to be an unjust and unwarranted reflection, not only upon her integrity but upon that of her counsel as well.

After writing this letter, Mrs. Harvey was, on January 5, 1912, again called to the stand before the Referee in Bankruptcy, and then and there corrected this testimony. She said:

"I made a mistake in my testimony and want to correct it. On thinking it over I kept this stock in my own safe in my house (Tr., p. 142). . . . I made a mistake in my testimony. That is the reason I want to correct it. I never had any shares of stock of the Shore Line Investment Company in my box at any time. I kept that stock in my own safe" (Tr., pp. 136-37).

This was not a correction made upon the trial of this case before the trial judge. Mrs. Harvey made it before the Referee himself several months before this suit was brought!

Mrs. Harvey's explanation given upon the trial of this case was, we insist, entirely satisfactory. She says, referring to her first appearance before the Referee:

"I went over the transaction in my own mind in a certain vague way. I did not know what questions I was going to be asked and I answered just as I then remembered. I thought at that time I had put this stock in safe deposit. There was also mentioned in the letter an item which I had omitted and which I did not recall upon the stand, and that I also put in my letter. After I had written the letter I went on the stand and made correction of my testimony" (Tr., p. 169).

We desire to emphasize the point that Mrs. Harvey's conduct in this matter was exactly what would be expected from an honest witness who had learned that an effort was being made to cast discredit upon her and who then realized that she had been mistaken as to a particular fact. Her conduct is none the less favorable to her because it is possible that a wilful perjurer fearing discovery, might have been willing to shift his testimony to accommodate a similar situation.

The conduct of Mrs. Harvey in correcting her error was not only consistent with honesty, but it was demanded of her if she were a truthful woman. It would be a hard rule, indeed, which would hold

that because a dishonest witness might have imitated her action, that therefore she must herself be held to be base and criminal.

Conduct which is susceptible of two constructions—one consistent with honesty, the other not—must be resolved in favor of the presumption of innocence.

That Mrs. Harvey's fault was due to lack of accurate memory, and not to deliberate perjury, is not only clear from what has been said, but is demonstrable from a portion of her testimony which could have no conscious bearing upon the question of her credibility when it was given. It will be noted that she had not visited her safe deposit box at all between the time that she gave her testimony before the Referee on December 5, 1911, and the times she again appeared before him on January 5th and January 12th, 1912, for the purpose of correcting her testimony (Tr., p. 143).

When she testified on January 5th and January 12th, 1912, she was therefore dependent for an enumeration of the things kept in her safe deposit box upon her memory alone—just as she was on December 5, 1911. She returned to the stand on January 5th and January 12th, 1912, for the very purpose of correcting her former testimony. On these dates—January 5th and January 12th, 1912—she declared repeatedly before the Referee that she at that moment had no certificates of stock of any

corporation whatever in her safe deposit box, and that she had none therein at any time between 1905 and 1910 (Tr., pp. 137, 138, 139, 140, and 142). She could have had no possible motive for making a false statement in these particulars.

And yet at that very moment she had in said box two certificates of the Bullfrog mining stock, one of which was dated December 4, 1906; the other, April 8, 1908 (Tr., p. 173). These she discovered later on visiting the box at a date subsequent to the hearing of January 12, 1912 (Tr., p. 172).

On the trial in the court below she testified:

"Since that testimony was given I went to my safe deposit box. At the time I testified I could not recall anything more as being in that box except the articles I testified to, but when I went to the box, I found other papers besides those letters, including two old deeds and another antique, two or three. I found Mr. Harvey's will and my own will. At the time I testified, I had forgotten both the wills and the deeds. There were no shares of stock in the box, **except some Bullfrog mining stock. There was also a little envelope which shows that I have some more stock on the books of that company. . . . I had no recollection on the 5th day of December, or on the later day when I testified that there was any Bullfrog stock in my safe deposit box**" (Tr., p. 172).

The foregoing evidence should satisfy a reasonable mind, we emphatically insist, that defendant's memory alone was at fault. The psychology of the whole situation seems to be clear enough: The certificates given her by Mr. Harvey she had placed in her safe at home in 1905 and 1906. Her cer-

tificates representing Bullfrog mining stock were dated December 4, 1906, and April 8, 1908 (Tr., p. 173). This stock she had placed in her safe deposit box. She had forgotten absolutely that she had ever placed Bullfrog stock there; but evidently she had an indistinct mental impression that she had placed some stock there. When questioned on December 5, 1911, before the Referee about the Shore Line Investment stock—a transaction dating from approximately the same time as the Bullfrog transaction—she confused the two transactions. It was neither unnatural nor unreasonable nor absurd that she should have done so.

2. Mrs. Harvey's written memorandum affords no just ground for discrediting her testimony.

This memorandum reads as follows:

"300 shares delivered June 26th, 1905;
On August 22nd, 1905, received 40 shares;
On August 22nd, 1905, received 26 shares;
On September 22nd, 1905, received 180 shares"
(Tr., p. 167).

Concerning this memorandum the Circuit Court of Appeals said:

"Again the memorandum of Mrs. Harvey touching the time when she received this stock seems to discredit her, but she explains by saying she used the date of the certificates rather than the actual date when she received the stock in making the record, and this reconciles the receipt of the first 300 shares with the fact that she was probably away in New York on the date of its issue" (Tr., p. 210).

The history of the memorandum was this: Mrs. Harvey on December 5, 1911, before the Referee in Bankruptcy testified that "in June" 1905—day of month not stated—Mr. Harvey had given her a certificate for 300 shares of the stock (Tr., p. 133). She also said "I remember the date on which these certificates were given me because I put them down on a memorandum" (Tr., p. 134). *This was not, however, the memorandum above set forth.*

Several months later on the trial of this case the witness explained how she came to make the memorandum set forth above. She says: "This memorandum was made by me in response to a request of the Court" (Tr., p. 168). ("The Court" was the Referee in Bankruptcy.) It also appears that Mrs. Harvey wrote it out soon after December 5, 1911, and handed it to the Referee on January 5, 1912 (Tr., pp. 168-169).

On January 5, 1912, she testified before the Referee:

"I received my first certificate of stock in the Shore Line Investment Company in June, 1905. I have a memorandum of those dates which I now hand you. This memorandum shows that on June 26, 1905, I received 300 shares of stock in the Shore Line Investment Company" (Tr., p. 141).

This memorandum was not a *copy* of anything. It was made up from some slips of paper on which Mrs. Harvey had merely noted down the dates and the number of shares of the several stock certificates

(Tr., pp. 166-167). These slips did not contain anything more.

When Mrs. Harvey made up the memorandum for the Referee, she had no independent recollection of the precise date of delivery (Tr., p. 166), but she did know that "the dates on the certificates were *approximately* the dates on which they were received" (Tr., p. 167). That was why she put down in this memorandum the dates of the certificates as the dates on which they were "delivered" or "received."

It should be noted that after she handed this memorandum to the Referee, she was not asked any questions about it at all. *She at no time testified that the dates were exact.*

But on the trial of this case the document was produced by appellant on her cross-examination, and she was questioned about it; and she promptly explained that the dates of delivery set forth in it were only *approximately* correct (Tr., p. 167).

The learned trial judge nevertheless committed the error of supposing that she had once testified that the dates were exact and later on had changed her testimony.

Not only this, but he thought that she had deliberately changed it for a sinister purpose; in other words, that she had committed wilful perjury, for he says:

"Later, she testified that the dates were the dates of the certificates, not the dates of their receipt, and that each memorandum was made on the date when the corresponding certificate was received.

"It is difficult to avoid the suspicion that this change in Mrs. Harvey's testimony was made in order to escape the effect of the evidence showing that she was in New York in June, 1905, at the time she says she received the certificate for 300 shares from Mr. Harvey" (Tr., pp. 43-44).

The grievous injustice of the foregoing words is absolutely demonstrable; for at the time that Mrs. Harvey testified that the dates on the memorandum were only approximately correct (Tr., p. 167), there was not one word in evidence even remotely suggesting that Mrs. Harvey was in New York on June 26th! On her cross-examination she had said that the dates were only approximately correct, and the first and only mention of New York in this whole record came later on during her re-cross-examination. Moreover, it came frankly from Mrs. Harvey herself. Here is what she said:

"On the 26th day of June, 1905, I think I was in San Francisco, but I am not positive. I was here very shortly after, if not at that date, during the first part of July. . . . I do not know what weeks of June I spent in New York. I think I was in New York the latter part of June, 1905. I do not know whether I was on the train on the 4th day of July, en route to San Francisco. . . . If I was here in the beginning of July I was in New York on the 26th. I think I was in New York or on the way back on July 4th" (Tr., pp. 173-174).

The only other evidence regarding New York came afterward, but with equal candor from Mrs.

Harvey's daughter (Tr., p. 174). The evidence that Mrs. Harvey was not in California in June, 1905, is not at all conclusive. Neither she nor her daughter was positive on the question.

But whatever the fact may be as to her whereabouts on that day, the point is that the trial judge mistakenly thought that Mrs. Harvey changed her evidence and stated that the dates on her memorandum were only *approximately* the dates of delivery, in order to offset evidence to the effect that she was in New York on the 26th day of June, 1905, when in truth nothing whatever had been said about New York at the time she made the explanation that the dates were only approximate.

However unintentional a mistake such as the foregoing may be, it is none the less a very cruel and serious thing for the unhappy victim of it. It would be unfortunate, indeed, if a Court of Appeals under such circumstances could not vindicate a woman's reputation from the stigma cast upon it by such a judicial blunder.

Counsel seek further to discredit Mrs. Harvey by saying that it was an absurd thing for her to have kept memoranda of the dates of her certificates of stock and the number of shares. But we submit that it was neither absurd nor unusual. Such certificates may be stolen or lost or destroyed by fire or accident and it is not an unwise nor an

unusual precaution for people to note down just what Mrs. Harvey noted down.

3. No inference is deducible from Mrs. Harvey's failure to call Lizzie Anderson or Mr. Folger.

Mrs. Harvey testified:

"Lizzie Anderson was my maid during 1906; she had the combination to my safe. She frequently opened the safe at my bidding" (Tr., pp. 141-142).

The point is urged that Lizzie Anderson should have been called by Mrs. Harvey. It does not appear where she was at the time of the trial or that she ever had any information whatever about these certificates.

There is no presumption that she knew or would be likely to know anything about them. There is no testimony that they were exposed to view while in Mrs. Harvey's safe. Mrs. Harvey did not testify that Lizzie Anderson ever saw them. If one produces inferior evidence when presumably he could produce a higher degree of evidence, a presumption may be indulged that the higher would be adverse. But it is a new doctrine that failure to produce a housemaid who had access to a safe probably to put her mistress' jewelry in and out, is evidence that if certificates of stock had by any chance been among the papers in the safe the maid would have known of the fact. On the contrary, the presumption is that the conduct of the maid was proper

and that she did not open her mistress' safe except at her bidding and that her mistress' envelopes and private papers were not rummaged through by her. If she had ever examined the papers and documents in the safe, and if she had failed on such examination to find these certificates, why, it may well be asked, did not the appellant produce her and prove the fact? They could find her as easily as Mrs. Harvey could. If she knew anything favorable to them they should have produced her.

Similarly, the fact that Mr. Folger was not called is commented upon by counsel. If it appeared that he knew anything favorable to either party, the criticism would be justifiable. Mr. Harvey obtained from Mrs. Harvey a certificate for 66 shares and had it transferred into Mr. Folger's name. Later it was again transferred from Mr. Folger's name to Mr. Harvey's name. Mr. Folger did not meet Mrs. Harvey in the transaction, and there was no reason why he should have known anything relevant to the case.

4. Concluding remarks as to the testimony of Mr. and Mrs. Harvey.

In concluding the discussion of Mr. and Mrs. Harvey's testimony, we desire to emphasize the fact that in no part is it susceptible of a construction which is not favorable to truth and honesty. The presumption that a witness speaks the truth and that

he is innocent of a crime or wrong is not lightly to be overcome. The law in such cases is clear:

"In actions involving fraud, as in other cases where the facts present a double aspect, one consistent with fair dealing and the other involving dishonesty of purpose, the court, unless the scale decidedly preponderates for the latter, will strike the balance in favor of honesty and innocence."

Jones' Commentaries on Evidence (Blue Book, 1913), Vol. 1, Sec. 13.

"The presumption in favor of innocence, says a learned writer, is not confined to proceedings instituted with a view of punishing the supposed offense, but holds in all civil suits where it comes, collaterally in question."

Case v. Case, 17 Cal., 600.

"When in the trial of a civil cause, a person is charged with fraud, dishonesty, or crime, there is a legal presumption that he is innocent, and he is entitled to have such presumption considered by the jury in connection with the evidence in the case."

Childs v. Merrill, 29 Atl. Rep., at 533.

Diametrically the opposite presumption—the presumption of guilt—seems to have dominated the consideration of the evidence by the trial court. Any fact presenting a double aspect—one consistent with probity and the other with perjury—was resolved against the witness. This misconception of the established rule was not present in the deliberations of the U. S. Circuit Court of Appeals.

THIS IS A CASE WHERE THE STRONG PREPONDERANCE OF THE EVIDENCE IS AGAINST THE FINDING OF THE TRIAL JUDGE.

Thus far we have shown that the trial judge made a number of serious mistakes in his consideration of the evidence. In doing so we have necessarily gone somewhat into the merits. But it is, we think, proper that some stress be laid upon the second proposition which we put forward at the beginning, viz: that an appellate court will not hesitate to reverse the findings of a trial judge when they are against the weight of the evidence.

Upon this proposition the United States Circuit Court of Appeals said—referring to the conclusions of the trial court:

"We think . . . that the strong weight of the testimony is against its findings" (Tr., p. 211).

That this conclusion was correct we shall now proceed to demonstrate:

The witness whose testimony is relied upon to establish the fact that the gift was made in 1905 are not only the two principals to the transaction—Mr. and Mrs. Harvey;—but also Mr. Fay, now Postmaster of San Francisco—Mr. Burke Corbet, a reputable practitioner at this Bar; Mr. Wasserman and Mr. Crosby, who were Mr. Harvey's bookkeepers, and Mrs. Barron, daughter of Mr. and Mrs. Harvey.

MR. HARVEY testified as follows:

"I was one of the organizers and incorporators of the Shore Line Investment Company, incorporated. In May or June, 1905, prior to the incorporation, I visited the lands subsequently deeded to the company. My wife was with me on the occasion of my first visit (Tr., p. 148). . . . It was intended as an investment or improvement land company, and I showed Mrs. Harvey where the principal holdings was to be on the north end of Halfmoon Bay, now known as Granada, and I told her we were about to acquire property there. . . . I told her at that time that I was going to give her my stock that I would acquire in that land company. After the acquisition of the land, and the organization of the company, the stock was issued to me in June, 1905, one lot, another lot in August, 1905, and two lots in September, 1905. Stock certificates were issued to me and when I received them, I endorsed them and gave them to Mrs. Harvey in conformity to what I told her I was going to do" (Tr., p. 149).

Mr. Harvey further testified that on one occasion in 1906 he got one of the certificates from Mrs. Harvey and transferred the same into the name of J. A. Folger, to enable the latter to act as a Director in the corporation; that Mr. Folger endorsed the certificate of stock and it was returned to Mrs. Harvey (Trans., p. 151); that later on, in 1907, the certificate standing in Mr. Folger's name was again placed in Mr. Harvey's name and the certificate was endorsed by him and returned to Mrs. Harvey (Trans., p. 152).

He also testified that early in November, 1909, he got all the stock from Mrs. Harvey and delivered it to Mr. Fay for use in a proposed financial trans-

action, and that on Nov. 26, 1909, in the expectation that Mrs. Harvey would be called upon to sign a certain agreement as a stockholder, the shares were transferred into her name (Trans., p. 153).

The witness then continued:

"I have never had the certificates in my possession except as I have testified here, from the time they were first delivered until this action was commenced. . . .

"I was never the owner of the stock in question here—546 shares of the Shore Line Investment Company. I bought it for Mrs. Harvey. I never considered it mine. It was my money which purchased the stock, but I acquired it for my wife. I was never connected with the stock in any way, except to vote it and carry out the duties of an officer of the corporation. Immediately on acquiring the stock I regarded it as her stock" (Tr., pp. 154-155).

MRS. HARVEY testified as follows:

"Mr. Harvey handed me certificates of stock of the Shore Line Investment Company, in 1905, as he got them; in San Francisco, some of them. The only communication I had from him was when I was in New York to the effect that there had been an assessment and that he had paid it, and when I came home I gave him the certificates. (Note that this was for the purpose of having them stamped with the words "Assessment Paid" (Tr., pp. 127-128)). These had remained altogether in my possession from 1905 until 1909 with the exception of the time of the payment of the assessment, and the changing of the shares to Mr. Folger, as has been testified here. I had the certificates continuously in my possession and they were endorsed" (Tr., p. 166).

The testimony which is directly corroborative of the testimony of Mr. and Mrs. Harvey, and which the learned Judge of the trial court failed utterly to

grasp the full significance of, covers a number of years. Beginning with the year of the gift—1905—it runs as follows:

1905.—BURKE CORBET, an attorney of this Bar, associated with Mr. Harvey in the Shore Line Investment Company, and Secretary of the corporation, testifies:

"I am the Secretary of Shore Line Investment Company, a corporation, and have held that office ever since the organization of that company in May or June, 1905. I also have in my possession the original certificates issued to Mr. Harvey" (Tr., pp. 86-87).

"Prior to the issuance of any stock whatever, in the name of Mr. J. Downey Harvey, I had a discussion with him as to how the stock that was subsequently issued in his name should be issued. He said to me at that time that he was buying the stock and was giving it to Mrs. Harvey. I suggested to him then that if this was true the stock should be issued in Mrs. Harvey's name. Mr. Harvey said that he preferred to have it issued in his own name because he wanted to be a Director of the corporation, and wanted to participate actively in the management of the corporation. I told him at that time, and at a number of other times when subsequent stock certificates were issued in his name, that I thought the stock ought to be issued in the name of Mrs. Harvey, if she was the owner of the stock, and advised him at different times to that effect.

"At all of those times before any stock was ever issued in the name of Mr. Harvey, he stated to me that he had given the stock to Mrs. Harvey. After the stock was issued, we discussed it a number of times, and he told me he had given it to Mrs. Harvey. . . . The reason that I, knowing these facts, permitted him to sign a document, 'we, the undersigned owners and holders of the number of shares of stock,' etc., was because the stock showed on the books of the corporation in Mr. Harvey's name, and I deemed it advisable, in order to make the thing show as being a legal document, that it be signed by Mr. Harvey, and I advised Mr. Harvey at that time to sign the document" (Tr., pp. 97-98).

1906.—CHARLES W. FAY, now Postmaster of San Francisco, testified as follows:

"I am the general manager of the Shore Line Investment Company. I have held that position since January, 1906. I met Mr. Harvey very frequently. . . . Mr. Harvey told me at this time that this stock was Mrs. Harvey's. This was in 1906" (Tr., p. 164).

1907.—MRS. WARD BARRON testified as follows:

"I am the daughter of Mrs. J. Downey Harvey. During the winter of 1907 I resided with my mother in Monterey. We were there for two or three years at the Hotel Del Monte. During that time I had some conversation with my mother about my father's affairs. . . .

"My mother was worried very often about the affairs of the Ocean Shore, and I asked her if she did not have anything of her own that would be very valuable, *and she said that she had shares in the Shore Line Investment Company*, and those, Mr. Harvey told her, were going to be very valuable some day. This conversation took place in 1907, and several times after that" (Tr., p. 174).

1907.—EDWIN A. WASSERMAN, former bookkeeper of Mr. Harvey, testified as follows:

"At the time the assessment of the stock was paid,—I do not know the exact date, but it would show in the book,—I remember distinctly about asking Mr. Harvey about a receipt or entry for that assessment, and he told me that Mrs. Harvey—she, I think, was away at the time—that when she came back he would have the receipt entered on the stock. It was my habit when Mr. Harvey paid an assessment, to have the receipt entered on the back of the stock. Mr. Harvey told me that Mrs. Harvey had possession of the stock at this time when the assessment was paid. This date was April 13, 1907. I made the entry on page 44 of Mr. Harvey's ledger showing the payment of this assessment" (Tr., p. 116).

1907.—JAMES W. CROSBY, afterwards Mr. Harvey's bookkeeper but who in 1907 was in the employ of Shore Line Investment Company, testified as follows:

"I was in the employ of the Shore Line Investment Co. at the time that the assessment was paid in 1907. I had a conversation with Mr. Harvey at this time. . . . I do not remember the exact conversation, but he brought me a check in payment of the assessment. He told me at that time that it was to pay the assessment on Mrs. Harvey's stock, that Mrs. Harvey was away at the time and consequently he could not get the certificates, but he would bring them to me later to have the notation 'assessment paid' stamped or written on the back of the certificates. This was done at a later day" (Tr., pp. 127-128).

1905-1908.—MR. WASSERMAN testified further to the following very significant circumstance:

"I remained in Mr. Harvey's employ until about the middle of 1908. . . . While I was in Mr. Harvey's employ I had access to his safe where he kept stocks and bonds and papers of that character. We had two safes at that time, in his office, one was a personal safe of Mr. Harvey's and the other was the safe of the Martin Estate. At all times, commencing with 1905, I had access to all compartments of Mr. Harvey's safe, except one compartment which was held by a friend of Mr. Harvey's who was in the office. All the rest of the safe was used by Mr. Harvey. I also went quite frequently to Mr. Harvey's safe deposit box.

"I went there a great many times for the purpose of checking up the assets in that box. This box was in the First National Bank at Bush and Sansome streets. During each year at least, that I was in Mr. Harvey's employ, I went to this box and checked up the securities. At the time of the San Francisco Fire I went up to the office in the Columbian Building, opened the safe and gathered up all our securities and papers that I thought were valuable. I took them down to an automobile which I had at that time, and out to Mr. Harvey's

house. One block of papers I carried around for some time in a wallet, on my person, as I did not know whether Mr. Harvey's house would burn or not. This was the wallet within which Mr. Harvey had his securities, insurance policies and other valuable papers.

"I never saw any stock of the Shore Line Investment Company in Mr. Harvey's custody, either in his office safe, or in his safe-deposit box, or at the time that I took his securities to his house. At no time between the year 1905, and the time that I left Mr. Harvey's employ in 1908, did I see any certificates of stock of the Shore Line Investment Co. in the custody or control of Mr. Harvey" (Tr., pp. 116-118).

1909.—CHARLES W. FAY further testified as follows:

"I recall the circumstance of a negotiation with reference to paying off some indebtedness of the Shore Line Investment Company, in 1909. As General Manager of the Shore Line Investment Company, I was authorized to negotiate for a loan to clean up this indebtedness. I negotiated with a certain banking institution here, and one of the conditions was that the stock of the various stockholders, or at least 90% of them was called for, for the purpose of securing this loan. Also, that an agreement should be signed by the owners of the stock, holding themselves proportionately liable for the amount to be borrowed. I called on Mr. Harvey and asked him for the stock held in his name in this Company, explaining my purpose. He said he would get the stock; that it was Mrs. Harvey's stock. I asked him how long it would be, and he said he would have to send for it; I believe that Mrs. Harvey was then at Del Monte. Two or three days subsequently I called on him and he gave me the certificates of stock standing in his name, endorsed" (Tr., pp. 164-165).

"When Mr. Harvey gave me those certificates, as I previously testified, they bore his endorsement on the back. The earliest date that I saw these certificates was the latter part of October or the first part of November, 1909. They were not endorsed to Mrs. Harvey, but simply in blank, as I recall them" (Tr., pp. 175-76).

Three of these witnesses—Mr. Corbet, Mr. Was-

serman and Mr. Crosby—were called by the appellant.

THE VALUE OF THE CORROBORATING EVIDENCE
UPON THE QUESTION OF THE TIME OF DELIV-
ERY OF THE GIFT.

The declarations made by both Mr. and Mrs. Harvey years before Mr. Harvey's bankruptcy and at times when he was solvent, are not to be lightly brushed aside. Their evidentiary value is well recognized in the books. Here was a case where it was claimed that the story of the delivery of these certificates as a gift in 1905 was a fraudulent concoction of a recent date—a fabrication conceived of and put forth by them years after the date they claim as the date of the gift. The evidence of corroborating witnesses was that similar declarations were made years before Mr. Harvey was insolvent and it shows that their acts and declarations have been through many years entirely consistent and in harmony with their present testimony regarding the date of the gift.

The following quotations will sufficiently point to the law on the proposition:

"The effect of the evidence of consistent statements is that the supposed fact of not speaking formerly, from which we are to infer a recent contrivance of the story is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story.

This use of former similar statements is universally conceded to be proper."

Wigmore on Evidence, § 1129, Vol. II.

"It is contended by the appellants that all statements . . . of admissions made by John W. Holland that he had given the stock to his wife are inadmissible. It must be borne in mind that the statements of John W. Holland, sought to be excluded, were made by him when he was entirely free from debt. The question is, therefore, whether declarations of a husband, who is free from debt at the time the declarations are made, are admissible to prove a gift in favor of his wife. Upon well-settled principles, we answer this question in the affirmative. Not only was the gift in question made when the donor was free from debt, but his declarations touching the gift were practically contemporaneous therewith, and made when, as shown by the record, from the nature of things, he could have had no suspicion of the financial difficulties in which he was subsequently involved by the speculations of his brother . . .

"To hold inadmissible the declarations of the husband made under the circumstances of the case in judgment, would be, as said by the learned judge of the circuit court, to defeat a class of benefactions which, under certain conditions, are not only lawful, but are in a high degree commendable."

First National Bank v. Holland, 39 S. E., 126, 128.

"On this subject in *People v. Doyell*, 48 Cal., 90, the Court say: 'Such declarations may, however, be admissible in contradiction of evidence tending to show that the account is a fabrication of late date, when it may be shown that the same account was given before its ultimate effect and operation could have been foreseen; and also, perhaps, in other peculiar cases.' And in *Barkly v. Copeland*, 74 Cal., 4, it is said: 'It has been frequently held that when the witness is charged with testifying under the influence of some motive prompting him to make a false statement, it may be

shown that he made similar statements at a time when the imputed motive did not exist."

Electric, etc., Co. v. Safe Deposit, etc., Co.,
145 Cal., 124, 130.

"There are exceptions; but they are of a peculiar nature, not applicable to the circumstances of the present case; as where the testimony is assailed as a fabrication of a recent date, or a complaint recently made; *for there, in order to repel such imputation, proof of the antecedent declaration of the party may be admitted.*"

Ellicott v. Pearl, 10 Peters, 439 (12 Curtis, at 186).

"Whether or not there was a gift of these deposits by Moses Sprague to his wife depends wholly upon his actual intention. . . .

"His purpose was a matter between him and her exclusively, and was manifested and could be proved by his contemporaneous declarations, or by his declarations made before or after delivering the order. There is no better proof of intention than declared intention, and it is often the only means of proof."

Sprague v. Walton, 145 Cal., 228, 233-234.

Unless not only Mr. and Mrs. Harvey, but also the Postmaster of San Francisco, together with a reputable member of this Bar, and two young bookkeepers and a young matron (whose simple story of her mother's declarations made to her in 1907 stand out in sharp contrast to what a perjurer would likely have brought to the aid of the mother under such circumstances)—unless all these witnesses have falsified themselves—there is no excuse for doubting

that this stock was given over to Mrs. Harvey in 1905.

THERE IS NO MERIT IN THE SUGGESTION THAT MR. HARVEY WAS CLOTHED WITH A FALSE CREDIT BY MRS. HARVEY.

Counsel claim in their brief (p. 53 *et seq.*), that by permitting this stock to remain in Mr. Harvey's name after the gift was made, Mrs. Harvey clothed her husband with a false credit, and their idea seems to be that the gift was fraudulent for that reason, even if it was made in 1905 when Mr. Harvey was solvent.

But there is not the slightest foundation either in law or in fact for such a proposition. The fact that the stock stood in Mr. Harvey's name was not a matter about which the personal creditors of Mr. Harvey had any legal right to know anything. In California the stock books of a corporation are not accessible to the creditors of the individual stockholders. They are open to no creditors save those of the corporation itself.

A quotation used already in another connection in this brief illustrates this. The Supreme Court of California refers to the:

" . . . notion that 'the stock and transfer book' of a corporation is made a public record, accessible to all persons, intended to give notice to everybody of the status and ownership of the title to the stock, and that

it is therefore available to the creditors of the stockholders and to persons dealing with them with respect to the stock."

And the Court goes on to say:

"This is the law of some of the States where the rule contended for by the defendant prevails, **but it is not the law of this State.** . . . The creditors of the individual stockholders have no such right of access, and the books could not constitute notice to them. **Nor could these books hold any person out to the world as the owner of any stock, since the world could not have access thereto.** Stockholders and creditors of the **corporation** are the only persons who have the right to inspect the books (Civ. Code, Sec. 378)."

Nat. Bank, etc. v. Western Pac. Ry. Co., 157 Cal., at 581.

Not only had the personal creditors of Mr. Harvey no legal right to know that this stock stood in his name on the books of the corporation, but what is of greater moral importance still, *there is no suggestion in the record that any creditor of his ever did in fact know anything about it or extend to him a penny's worth of credit on the faith of any such knowledge.*

This case, therefore, bears no analogy whatever to that class of cases in which, for example, a mortgage of land or a chattel mortgage is deliberately withheld from public record for the purpose of deceiving the creditors of the mortgagor and so clothing the mortgagor with a false credit.

THERE WAS AN ACTUAL AND CONTINUED CHANGE
OF POSSESSION OF THE STOCK CERTIFICATES
GIVEN TO MRS. HARVEY.

Our opponents' discussion of this topic presupposes an endorsement and delivery of the certificates in 1905, just as Mr. and Mrs. Harvey both claim.

But it is insisted that the certificate is but a symbol of ownership and that something in addition to endorsement and delivery must be done to make a transfer of shares of stock valid as against creditors.

But counsel do not tell the court what should be done to make the transfer valid. They rely, however, upon §3440 of the Civil Code of California. That section refers to transfers of all kinds—*whether by sale, exchange or gift*. It declares that:

"Every transfer of personal property, *other than a thing in action* . . . is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors. . . ."

§3440, Civil Code of California.

The portion of said section which we have italicized in the foregoing quotation is wholly omitted by counsel on page 57 of their brief.

It will be seen from the wording of the statute

that if counsel's interpretation is correct, then the everyday sale and transfer for value accomplished by the usual endorsement in blank and delivery of the certificate to the vendee would be void as against the vendor's creditors. But, of course, this is not the law.

Moreover, stock in a corporation is a "thing in action" and is expressly excepted from the operation of the said section. As already noted, the significant words "other than a thing in action" were omitted by our opponents in quoting the section.

"Stock in a corporation is a chose in action, and the certificates are the evidence of its existence and of its amount. . . . Because the stock in a corporation is transferred by means of the delivery, or by means of the indorsement and delivery of the certificates, the latter by a sort of mental substitution come to be thought of and dealt in as the stock itself."

Allen-West Com. Co. v. Grumbles, 129 Fed. Rep., 287, 290-291.

The general rule in cases of gift as well as sale is that the endorsement and delivery of the certificate passes the title as against the world:

"If the subject of the gift is a chose in action, such as a bond, a note, or stock in a corporation, the delivery of the most effectual means of reducing the chose to possession or use, such as the delivery of the bond, or the note, or the certificate of stock, if present and capable of delivery, is indispensable to the completion of the gift. *Richards v. Delbridge*, L. R. 18, Eq., 11; *Knight v. Tripp*, 121 Cal., 674, 679, 54 Pac., 267; *Miller*

v. Jeffress, 4 Grat., 472, 480; *Matthews v. Hoagland*, 48 N. J. Eq., 455, 487, 21 Atl., 1054; *Wadd v. Hazelton*, 137 N. Y., 215, 219, 33 N. E., 143, 21 L. R. A., 693, 33 Am. St. Rep., 707; *Matter of Crawford et al.*, 113 N. Y., 560, 21 N. E., 692, 5 L. R. A., 71; *Beaver v. Beaver*, 117 N. Y., 421, 22 N. E., 940, 6 L. R. A., 403, 15 Am. St. Rep., 531; *Liebe v. Battman*, 33 Or., 241, 54 Pac., 179, 72 Am. St. Rep., 705; *Williams v. Chamberlain*, 165 Ill., 210, 218, 46 N. E., 250; *Gartside v. Pahlman*, 45 Mo. App., 160."

" . . . The indorsement and delivery, or the mere delivery, of the certificates, without entry of the transfer upon the books of the corporation, is generally held to constitute a valid sale of the stock between vendor and vendee, or a completed gift of it between donor and donee."

Allen-West Com. Co. v. Grumbles, 129 Fed., 287, 290-291.

The foregoing quotation states the rule in California.

Calkins v. Eq. B. & L. Assn., 126 Cal., 334;
Spreckels v. Nevada Bank, 113 Cal., 272;
National Bank v. W. P. Ry., 157 Cal., 573,
 576.

Both of the courts below dealt fully with this question and agreed that the law is in accordance with our contention. The trial judge said:

"Under Section 3440 of the Civil Code of California, unless the gift of Mrs. Harvey was accompanied by an immediate delivery, and followed by an actual and continuous change of possession of the stock certificates, it will be conclusively presumed to be fraudulent, and therefore void against those who were his creditors while he was in possession. No case has been called

to my attention, nor have I been able to discover one in which it is held that the possession of a stock certificate, endorsed in blank but not transferred on the books of the company, is not possession within the meaning of the section of the Code referred to. Consequently, if it be assumed or established, that the stock certificates in question, endorsed in blank, were actually given to Mrs. Harvey in 1905, and continuously retained in her custody and possession until November, 1909, when for the first time there was a transfer to her on the books of the corporation, I shall hold that her possession constituted that actual and continuous change of possession of the stock itself, which avoids the code provision referred to" (Tr., pp. 29-30).

The United States Circuit Court of Appeals said on this subject:

"In this relation we may pause to consider the point made by appellee that the alleged gift is in contravention of Section 3440 of the Civil Code of the State of California, which provides that every transfer of personal property, with certain exceptions is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void against those who are his creditors while he remains in possession, and the successors in interest of such creditors. . . .

"Registration of a transfer of the stock upon the books of the corporation is not essential to a valid transfer of the title, and this even though the certificate recites that it is transferable only on the books of the company and a surrender of the stock. *Nat. Bank of the Pacific v. Western Pacific Ry. Co.*, 157 Cal., 573. In view of this holding, if the testimony of Mr. and Mrs. Harvey is to be credited, there was a complete and actual transfer by endorsement and delivery of this stock by the donor to the donee, and the donee has continued in the sole possession and dominion thereof with the two exceptions noted, which, in our judgment, does not break the continuity and good title vested in the donee" (Tr., pp. 201-202).

CONCLUSION.

The record shows that in 1905 when Mr. Harvey made these gifts of stock to Mrs. Harvey, he was possessed of property worth from half a million to seven hundred and fifty thousand dollars (Tr., p. 151). The stock in suit cost him with the assessment a total of \$23,610.00 (Tr., p. 100). In February, 1905, he gave to his wife a piece of real estate which cost him from \$13,000.00 to \$15,000.00 (Tr., p. 102). He made one other gift of stock which cost him \$2,000.00 (Tr., p. 151). His money gifts were trifling. The grand total of all of his gifts represented a cost at the time they were made of from \$35,000.00 to \$40,000.00. Years after the gifts were made he lost his fortune in an unfortunate railroad enterprise (Appellant's Brief, pp. 34-35). He appears to occupy the unique position among unsuccessful railroad builders in this country of having lost his own money. His gifts to his wife were in no way disproportionate to his fortune at the times that he made them.

Not one act discreditable to him is shown by the record. No witness assailed his truth and veracity. He had lost his fortune, but he had at least retained his reputation.

Mrs. Harvey's reputation for truth, honesty, and integrity, does not appear ever to have been doubted or questioned prior to the assault made upon her testimony in this case. That she and Mr. Harvey

had lived long enough to have reputations is inferable from the fact that one of their married daughters was a witness in the case.

The Court of Appeals felt moved to say:

"We cannot think that Mr. and Mrs. Harvey deliberately and corruptly devised the story about what took place and that they have sworn falsely for the sake of saving this stock from the wreck of Harvey's business affairs for the wife's benefit" (Tr., p. 211).

Respectfully submitted.

Dated, San Francisco, March 25th, 1916.

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